MISSISSIPPI LAW JOURNAL

JOKERS COST MONEY
John Alan Appleman

FORUM NON CONVENIENS
Ben F. Cameron

December, 1951

VOLUME XXIII NUMBER 1

Completing the Picture

YES, now the picture's complete! AMERICAN JURISPRUDENCE states the law clearly and succinctly —the recently announced GENERAL INDEX leads you into this law quickly and accurately.

AMERICAN JURISPRUDENCE eliminates the long hours of search for the point vital to a winning case. Just turn to the GENERAL INDEX, flip to the catch-line or phrase you have in mind, and note your reference to page and volume in AMERICAN JURISPRUDENCE. Your search is over—in a matter of minutes.

Just write to either associate publisher for the complete story about this modern, exhaustively indexed text treatise of American law.

THE LAWYERS CO-OPERATIVE PUBLISHING CO.
Rochester 14, New York

BANCROFT-WHITNEY COMPANY
San Francisco 1, California

The MISSISSIPPI LIBRARY

FOR MAXIMUM SERVICE AT MINIMUM COST

Includes:

- ★ American Jurisprudence
- ★ American Law Reports and A.L.R. 2nd Series
- ★ A.L.R Permanent Digest
- ★ U. S. Supreme Court Reports, L. Ed.
- ★ New U. S. Supreme Court Digest Annotated
- ★ Federal Code Annotated
- ★ Nichols Cyclopedia of Legal Forms
- ★ Standard Textbooks

Available on Liberal Terms from

BANCROFT-WHITNEY CO.

Lawbook Publishers since 1856

200 McALLISTER STREET • SAN FRANCISCO 1, CALIFORNIA

Please mention *The Mississippi Law Journal* when dealing with our *Advertisers*

DELAWARE

for

Approved Corporations

Corporations formed upon telephonic instructions. Approved organization forms, exact cost, precedents, and our DIGEST of the law, furnished gratis to lawyers upon request. Over 50 years' service to lawyers.

Corporation Service Company

Delaware Trust Bldg. Telephone 6-8305 Wilmington 99, Delaware

Members:

HERMAN GLENN
WILL LEWIS
DAVID G. NEILSON
DAVID G. NEILSON, JR.

ANOTHER MISSISSIPPI INSTITUTION

THE J. E. NEILSON CO.

DEPARTMENT STORE

OXFORD

The Best Place to Shop for More Than 100 Years

MISSISSIPPI LAWYERS!

HAVE YOU OFTEN WONDERED WHETHER YOUR LAW JOURNAL CONTAINED A DISCUSSION OF THE POINT YOU ARE BRIEFING?

Now you can make the MISSISSIPPI LAW JOURNAL a regular part of your research. There may be a case comment on your leading precedent, a student note on your major point, or a feature article to give you the very background you need for your brief.

A glance at the new index for Volumes I-XX of the MISSISSIPPI LAW JOURNAL will tell you whether your point has been discussed.

Leading articles are indexed by topic, title, and author, notes by topic, and case comments by name and subject matter, in addition to tables of cases and statutes.

Order your copy today. The supply is limited.

Mississippi Law Journal Index

VOLS. I-XX — PRICE

Unbound $3.50

Buckram Bound $7.00

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXIII **DECEMBER, 1951** **NUMBER 1**

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

A. A. COHN, Brookhaven
Chairman
LAMPKIN H. BUTTS, Gulfport
C. DENTON GIBBES, Laurel
L. F. WILLIAMSON, Meridian
JOE A. McFARLAND, JR., Bay Springs
W. A. STRONG, JR., Louisville

Commissioner Members

THOMAS R. ETHRIDGE, Oxford
ROLAND D. MARBLE, Tylertown
MERLE PALMER, Pascagoula

FACULTY ADVISER
ARTHUR B. CUSTY

EDITORIAL BOARD
NANCY T. WOOD
Editor
CARY E. BUFKIN
Assistant Editor
CURTIS E. COKER
Business Manager
B. B. McCLENDON, JR.
Assistant Business Manager
GEORGE E. GLEASON
Note Editor
K. HAYES CALLICUTT
CHARLES N. DEAN
Case Editors
SHIRLEY JEAN NORWOOD
Book Review Editor

ASSOCIATE EDITORS

ROBERT BARBER, JR.
JOHN A. BELLAN, JR.
THOMAS E. DOUGLAS
JOHN B. FRENCH
ALBERT V. MILLER
RALPH D. PRUETT
JAMES McCLURE, JR.
KELLY McKOIN

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

MISSISSIPPI STATE BAR

1951-1952

OFFICERS

QUITMAN ROSS OF LAUREL ..... PRESIDENT
ROBERT NEWTON OF WIGGINS ..... FIRST VICE-PRESIDENT
LESTER N. WILLIAMSON OF MERIDIAN ..... SECOND VICE-PRESIDENT
MRS. ALICE NEVELS OF JACKSON ..... SECRETARY

COMMISSIONERS

W. C. Sweat	Corinth	Marvin Williams	Meridian
William Hewes	Gulfport	Howard Coleman	Tunica
Robert Smith	Ripley	Warner Beard, Jr.	Laurel
Edwin White	Lexington	J. K. Keyes	Collins
W. R. Ford	Kosciusko	W. H. Watkins, Jr.	Tylertown
James A. Torrey	Meadville	J. M. Morse, III	Poplarville
Francis Bowling	Jackson	John Holloman	Columbus
Herman Alford	Philadelphia	C. M. Swango, Jr.	Sardis
Karl Weil	Port Gibson		

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

Member, National Conference of Law Reviews
Member of the Southern Law Review Conference

VOLUME XXIII DECEMBER, 1951 NUMBER 1

CONTENTS

LEADING ARTICLES

JOKERS COST MONEY ..... *John Alan Appleman* 1

FORUM NON CONVENIENS ..... *Ben F. Cameron* 11

STATE BAR SECTION

THE CRISIS OF OUR TIME ..... *William N. Ethridge* 21

PRACTICE-HINTS FOR THE YOUNG AND A REMINDER FOR OLD ..... *Lester Clark* 28

NOTES

Adoption Proceeding in Mississippi and Suggested Procedure 34

Appellate Review in a Criminal Case of Errors Made Below not Properly Raised and Reversed 42

RECENT DECISIONS

Affinity—Position of Stepchildren 59

Bankruptcy—Degree of Care Required of Reorganization Trustee 60

Charitable Trusts—Cy Pres-Equitable Approximation 62

Construction of Deeds—Effect of Warranty Clause Upon Exception of Mineral Interest 64

Corporations—When Is a Corporation Doing Business 67

Descent and Distribution—Inheritance From Adoptive Parents—Effect of Second Adoption 69

Mortgage—Attempt to Have Absolute Deed Declared to Be a Mortgage 70

Tenancy in Common—Remedies of Tenants in Common of Personal Property Against Cotenant 71

Torts—Duty to Warn Fireman of Hidden Dangers 73

Torts—Liability of Hospital for Negligent Acts of Nurses 74

RECENT BOOKS 77

BOOKS RECEIVED 80

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, under the Act of Congress of March 3, 1879.
Published in October, December, March, and May
$4.00 per Annum $1.50 per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

FOR THE YOUNG PERSON INTERESTED IN A

Law Career

So You Want to Be A Lawyer

By Kenneth Redden

Whether the person you know is merely contemplating the study of law, or has definitely decided on its undertaking, he will find the pages covered with helpful information and advice in this book. Questions concerning law schools, bar requirements, entrance examinations, and the like are informally and intelligently presented and answered by the author.

Price $2.50

Career Planning in The Law

By Kenneth Redden

This book was written for the young law school undergraduate seeking that first job opportunity—and the young lawyer bent on improving his career. Here may be found, presented and analyzed, the many opportunities available to the law school graduate. The author tells, from his own practical experience, the best means of seeking and holding that important law job.

Price $3.00

Simply write *your name and address* in the margin and mail this page to us. We'll send the books out to you by return mail.

THE BOBBS-MERRILL COMPANY · INC.

INDIANAPOLIS · INDIANA *Publishers* ESTABLISHED 1838

Mississippi Law Journal

VOLUME XXIII DECEMBER, 1951 NUMBER 1

JOKERS COST MONEY

*John Alan Appleman**

As young lawyers, we are concerned primarily with finding out precisely what is the law. As we grow older, we find out not only that there is little precision in the law, but that the solutions of the law are often inadequate. If we consider Justice as the goal of all legal procedure, then we often fall short of that goal.

But the courts cannot always be blamed for the shortcomings which result. A court cannot substitute itself for a law-making body nor for those administrative officers who are charged with the functions which they are supposed to perform fearlessly. And, in many cases, the fact that an obvious injustice or apparent fraud can exist is chargeable to such officials and not to our courts.

It is that situation which I want to discuss in this article. It is my hope that the lawyers and other readers, whether in positions of influence or in private practice, will gird their loins in righteous indignation to do battle for a proper cause which deserves support. I propose, briefly, that we put an end to the legal racket which is termed the transaction of a "health and accident" insurance business.

In the dark ages of insurance, almost all fields of insurance were considered fertile territory for the entrepreneur, particularly if his scruples were not too great. After all, slitting envelopes and removing premium checks may bring a gleam to the eyes of any man. It is only the repayment of those funds in accordance with promises made in the policy which produces pain. Of course, in the early days, a man could merely pay out enormous chunks of funds in salaries and, when his claims caught up with him, fold up that company and start another. It was for such reasons that states adopted regulatory statutes, required financial examinations, and created the offices of insurance commissioners. Presumably, these things correct all evils.

---

*Attorney at Law, Urbana, Illinois; Author, INSURANCE LAW AND PRACTICE, West Publishing Co. (25 vols.); AUTOMOBILE LIABILITY INSURANCE, Callaghan & Co.; LIFE INSURANCE AND ESTATE ANALYSIS; President, Federation of Insurance Counsel, 1950-1951.

Yet, long after such steps had been taken, other evils persisted in the effort to avoid paying back on behalf of the policyholder the premiums collected from him. Only the processes became a shade more subtle. The principal device was that of exceptions and exclusions. As Amos and Andy said, "The big print gives it to you, and the little print takes it away."

Let us take automobile insurance as an example. Even twenty years ago, companies vied with each other to devise loopholes of escape. Coverage would be denied under various contracts where the driver was under age or had no driver's license, if he worked for a garage, was racing another car, had anything alcholic to drink either in his belly or in the interior of the car, transported any passenger for a consideration, whether cash or otherwise (one wonders how this would be construed in the case of a quid pro quo, of a healthy young man and young woman), hauled a trailer, rented or leased the vehicle to another, or if he were engaged in demonstrating or testing it. Recovery was prohibited to an injured person who was variously the named insured, an employee, a fellow servant, a member of the family, or a member of the same household. One company denied protection for wilful and wanton acts, which automatically excluded guest claims in the states where it transacted business. And, of course, if the insured failed to jump through a hoop after a loss, his protection ended for a breach of a condition.

Think of it! Only twenty years ago our state insurance departments were permitting such riddled contracts to be sold as sound and complete coverages. In fact, many such loopholes still exist, and it was not until the National Standard policy was worked out that the attitude of automobile companies changed. Now, most of such companies charge premiums commensurate with the risk and write an honest contract. In time, even more of the joker provisions will disappear.

But, so far as accident and health insurance is concerned, it is still completely in the dark ages. It has become and remains one of the greatest legal swindles possible to be perpetuated by man. In my work of estate analysis, when I require the client to bring in every life, liability, and other insurance policy for inspection, I can only shake my head sadly when it comes to health and accident insurance. Some companies are cleaner than others. Some companies operate complete rackets. None is what it ought to be. No such policy can be recommended by an insurance expert or estate analyst without misgivings.

Every man or woman who buys a policy of health and accident insurance is entitled to assume that he buys a contract which will protect him properly. No layman should be required to hire a lawyer to explain the terms of a policy before purchasing it. And, in truth, the great majority of lawyers are insufficiently versed in this field to render a proper advice. The buyer believes that he or she is protected in the event of personal

catastrophe and relies upon this belief—then a loss occurs and the buyer learns that he should have been three miles at sea on a cattleship headed for Barcelona when it was rammed by an English freighter, provided it occurred upon an alternate Tuesday in May.

Perhaps the illustration is a slight exaggeration, but only in degree, not in kind. The point is that we permit a laissez-faire policy to obtain in a field which we otherwise deem to be invested with a public interest. It may be an infringement of personal liberty to give broad powers to the Pure Food and Drug Administration, but if this body acted with even greater vigor, still fewer people would die from noxious foods and medicines. Insurance departments are a step in the right direction, but unless they are prodded by public spirited persons and supported in a crusade to remedy this evil, companies will continue to mulct millions in premiums and to deny coverage upon a loss.

Lest it be thought that I am exaggerating, I would like to point out a few things one will find in the policies of a few of the best companies.

There is a much advertised lifetime benefit health and accident policy of a semi-noncancellable type sold through medical associations and like organizations. Many doctors think they are buying a "non-can" policy; they are not, since, if the company's experience proves unprofitable, it may cancel out the entire group. But, specifically, I am interested in the so-called "Lifetime" disability feature of this contract. At $200 a month, if a man has a life expectancy of thirty years, he will receive a total of $72,000. That's a lot of money. This same contract has, like many others, a specific indemnity provision of $5,000 for loss of life, any two limbs, loss of sight, etc. But here's the joker. The policy provides that where total and permanent disability is caused by specific loss, the specific loss provision applies. So young Doc Brown loses his sight, or his hands, so that he can no longer examine patients or operate. He's been making $2,000 a month, but he reconciles himself to the idea of living upon $200 a month. Then the adjuster comes around and hands him a check. "Sorry, Doc, you didn't have an insurance lawyer scrutinize that policy wording. If you'd been disabled without a specific loss, we'd have to pay and keep on paying. But, now, even though you're completely disabled, our little joker comes into effect and this is all we'll ever owe you."

Now the company issuing this policy has been tremendously successful. There are other jokers among the provisions, but this is the most misleading.

Let us take another company, one of what I would consider the two best organizations in the business—that is, writing the cleanest type of health and accident insurance. How does it define disability? By the insured's inability to perform "any and all" of the duties pertaining to his occupation.

Would someone kindly tell me what these words mean? To me, the terms are directly and completely contradictory. If a man cannot perform "any" of the duties of his occupation, then he is really in a bad way. The courts consider a man totally disabled, as a general rule, if he cannot perform a substantial part of his usual duties. But, under this definition, if he could still sign his name this would be included under the term "any" and he could not recover. On the other hand, if a man is disabled from performing only one minor duty of his employment, he cannot perform "all" his duties and would be considered totally disabled. This would overlap the partial disability definition. Accordingly, the two provisions, so used together, render the entire definition meaningless.

This same company and another excellent company have another provision which makes me see red. Each of them writes a policy insuring against disability, the term being eight and one-third years or 100 months. For the first fifty months, the definition of disability is defined with reference to inability to carry on one's usual occupation. That's fine! But, suddenly, at the end of fifty months and for the remaining period the definition changes to "inability to carry on any gainful occupation". The old holdover of chiselling has just enough strength left to thrust its ugly head upright in otherwise excellent policies. So a man can sell pencils on the corner! Then, for the last fifty months, he's not disabled. Why don't these companies act honestly and call this a fifty-month contract instead of a hundred-month contract? Mink does not suddenly become skunk fur. Either a man is disabled or he is not disabled, and one definition —liberal or restricted—should control for the entire term.

Did you go to Bermuda, Jamaica, or Havana on your last vacation? The chances are that your policy absolutely excluded any risk or loss if you travelled outside the United States or Canada. If not, in all likelihood it required you to secure a "travel permit" before undertaking the trip. The company could point to its utter fairness, in the event of suit, and say that it would have issued such a permit if satisfied that the trip was normal. But if it was a customary trip, and the permit would be issued upon request, why require the doing of a useless act? If the company would not have issued the permit, then tear away the camouflage and let's have the truth! And how many persons read a policy before taking a vacation to ascertain the existence of such provisions?

Have you taken out an additional policy of either health or accident insurance lately? Probably you told the second agent about the first policy if he asked, because you had no fraud in mind. But what about the first company? Did you notify it about the taking of a second policy? It could easily have a provision limiting its liability, otherwise, to a pro rata recovery, or, under some of the peashooting varieties, it may completely avoid liability in the event of loss because of such additional insurance.

Let's just take some of the various instances under which losses would be excluded under many types of policies, or under which defenses might be asserted by an unscrupulous insurer, then analyze what protection it afforded. Here are various exclusions which we, in the insurance law fraternity, recognize and also what they can be construed to mean.

Self-inflicted injury. Naturally no one expects an accident insurer to pay a man for his fraudulent acts. But suppose the insured is hunting and the trigger of his shotgun catches in a barbed wire fence. To him it was terribly accidental, but the joker puts him in his place. Or he may have been cutting with a bandsaw when his hand slipped; he may have plucked a hair from his nose and had it become infected; he may have done a thousand acts which caused injury, yet each result may have been wholly unanticipated and violent. However, the insurance company may say, "It was self-inflicted."

External, violent, and accidental means. By the use of the first two words, the insurer again excludes self-inflicted injuries, though accidental, plus anything of internal origin—ptomaine poisoning, food poisoning, muscle strain, hernia, etc. So far as the once ridiculous debates as to accidental means versus accidental result are concerned, since legislatures and insurance officials have fallen down upon their jobs, the courts have taken care of this controversy. The better courts, and now almost all courts, are announcing their disinterest in how many angels can dance upon the point of a pin, and are becoming committed to the premise that a man is entitled to that which he was induced to believe he was purchasing. But, the expression above set forth still is a serious limiting device.

Intentionally inflicted injuries. If John Jones, an ex-client, is unhappy over the size of a fee and trips me, his act may have been intentional but, from my point of view, my falling was certainly unfortunate and accidental. Suppose, then, John Jones wasn't angry with me but that shyster down the hall, but he mistook my figure for his in the gathering darkness. Both of us would protest it as an accident—yet, the insurance company says, "That's why we leave no doubt about it. He intended to hurt you, although he may have been mistaken as to your identity."

Violation of law. Now, none of us would urge that companies underwrite the health, safety, and happiness of second-story men pursuing their professions. But their underwriting departments can weed out the Pretty Boy Floyds, even if their agents are careless. A blanket exclusion could prevent recovery in some geographical areas if a man were playing baseball or kissing his wife on Sunday, driving his car too fast, carrying a bottle of liquor in a dry state, or under many other circumstances.

Losses caused by intemperance or while the insured is intoxicated. Just remember, before you lift that Martini glass, to check your policy

and see if your insurance company has given you permission to do so. I have not yet found an exclusion as to accident resulting while in bed with one's wife, but injury resulting from bedding down with another man's wife has been excluded as resulting from a violation of law.

Inhalation of gas. Some companies, apparently fearful that a jury will not find suicide to be suicide, expressly exclude certain ways in which one may inflict self-injury or death. Of course, they apparently fail to recognize that a gas exclusion thereby eliminates coverage upon legitimate accidents resulting from a defective stove, furnace, or exhaust upon an automobile.

Poisons. For the same reason, some contracts exclude disability or death resulting from poisons. In actual litigation, many legitimate claims have been contested, including the taking of prescribed medicines, the accidental taking of a poison by selection of the wrong bottle, the consumption of bootleg liquor, the onset of ptomaine poisoning, and even poison ivy.

Failure to exercise due diligence or unnecessary exposure to danger. Most of us who would carry insurance against disability recognize that we are frequently careless and that our negligence may produce an injury. That is why we need insurance. The need is removed, to a large degree, if carelessness is eliminated. Since people will continue to be human beings, even though insured, such a provision is merely another clever means of escape from liability.

Other exclusions. Without going into great detail, we find other policies which exclude injuries received while on the roadbed of a railroad, while participating in aeronautics even as a passenger, or occurring after the insured has changed his occupation—even though the loss may have had nothing to do with his work. And, of course, if disease combines with accident either before, during, or following the occurrence of trauma, most accident insurance companies scream "no liability" at the top of their lungs.

Let us turn, for a moment, to questions of disease, or so-called "health features" of a policy. Many insurance companies play two different kinds of games. One type of company recites a long list of diseases which are highly unlikely to occur to an average American male, such as cholera, bubonic plague, etc., so as to build up an impressive but meaningless conglomeration of diseases covered. It insures against no others. The other type of company purportedly includes any disorders, but then it starts to list those which it does not cover and which, by sheer coincidence, eliminates the more common causes of disability. There are, I will admit frankly, some companies which employ a respectable and proper list of diseases against which they insure, but they are in the minority.

Here are some of the disorders we find excluded in various policies and which, it is apparent, eliminate a vast body of causes of disability: (1) Diseases or disorders of the heart of circulatory system; (2) Insanity and mental disorders or disturbances; (3) Pulmonary disorders (tuberculosis isn't enough, apparently; pneumonia and influenza must also be excluded); (4) Infections; (5) Smallpox; (6) Diseases of organs not common to both sexes; (7) Venereal diseases; (8) Paralysis; (9) Apoplexy; (10) Loss of life or disability resulting from medical, operative, or post-operative care; (11) Pregnancy or complications resulting from pregnancy or childbirth; (12) Orchitis; (13) Chronic diseases.

Now some of our little friends do better than others. They have practiced the fine art of writing policies of insurance which occupy many printed lines but promise practically nothing at all. These are often called "limited risk" policies. They may insure, for example, against "disability arising from the wrecking or disablement of a common carrier operating upon an established route between customary termini, wherein the insured is a farepaying passenger".

Let's break this down to see how these clever boys tick. Here are the various tests set up.

1. There must be a wrecking or disablement of the vehicle. It would not be sufficient for the insured to fall or be thrown from the vehicle while getting on or getting off. Nor would it be sufficient that he be thrown upon his face by a sudden lurch of a train. The conveyance would have to be in an accident wherein such conveyance was, itself, materially damaged.

2. It must be a common carrier. A private carrier, or private type of conveyance, would be insufficient.

3. Established route between customary termini. Chartered flights, private trips, and, possibly, even deviations in route caused by bad weather are out.

4. The insured must be a fare paying passenger. An employee, person traveling on a pass, or child too young to require a ticket would be excluded.

And, in any event, how many persons are injured in wrecks of common carriers each year? The risk of loss is so small as to be infinitesimal. But the daily risk—the automobile accident, the fall in a bathtub, the heart attack, the nervous breakdown—these are the essential hazards which produce disability.

It has always been my thought that a man who intends to be dishonest should be an outright crook—not a pettifogger. I have, therefore, worked out a couple of forms of short contracts which I submit for the consideration of these geniuses, under which I am convinced no claim would ever have to be paid.

Form 1

This policy insures against all disabilities except those arising from either external or internal causes. (This could be alternated, for greater confusion, with "except those arising either from accidental or non-accidental causes".)

Form 2

This policy includes all disorders, whether induced by trauma or disease, except those affecting directly or indirectly the skeletal, gastro-intestinal, circulatory, pulmonary, nervous, muscular, or dermatological portions of the body.

Form 1 refers to cause; Form 2 to the areas affected. It is my feeling that these monstrosities would permit an entrepreneur to retain 100% of premiums received instead of only the bulk of such premiums.

Now let's get back to existing policies. That was only an intermission, a breathing spell. We haven't begun to cover all the jokers yet. What is the test of disability?

We have already pointed out how most companies prefer to use such terms as "any gainful occupation", since even an invalid can usually address envelopes or make paper roses. Others refer to "any occupation", irrespective of the insured's training or abilities.

Then, most of the companies want to put additional restrictions upon the insured's disabilities. They may provide for payment only so long as the insured is actually confined "within doors", or for only so long as the insured is actually confined "to his bed". They may require the "regular", "frequent", or "weekly" attendance of a physician, "other than himself", even though such attendance would be expensive and of no benefit—hoping the insured will not know such treatment is required and will slip up on it prior to presenting a claim.

Some policies require that disability commence "immediately, wholly, and continuously" after an occurrence causing loss. In other words, if the injury becomes progressively worse until it causes disability, there can be no recovery. If the disability is intermittent in character, such as may be the case in a heart disorder or a spondylolisthesis, there can be no recovery (it hopes). And did you ever notice how limited in scope partial disability is? A man may be totally disabled for a few months and partially disabled for years or for the rest of his life—but the limit upon partial disability will be three months or six months. No, this isn't due to error or lack of foresight! It indicates excellent foresight in giving the last possible protection for the premium dollar.

Of course, all such policies, so far as I know, exclude losses resulting from any pre-existing disorder. Theoretically, this sounds fine, but what

does it mean, in practical effect? It is commonly said that every individual contains within him the seeds of his own destruction. He likewise carries within him the germs of almost every disorder known to man. Tuberculosis? Certainly you have such germs in your body. There is almost no common disease known of which you do not have the seeds of such disorder which may be activated by a lowering of bodily resistance, greater exposure, or other causes. Similarly, a perfect bodily organ is almost unknown. When it fails to function, it is usually a failure in degree and not *ab initio*. Therefore, an unscrupulous insurer could contest ninety per cent of all claims upon this ground alone. It is only the *result* of the disorder or the accentuation or aggravation of it to a degree which produces disability which forms the foundation of the average health insurance claim.

Again, suppose the policy provides for payment for specific loss or death if it occurs within fifteen days from an accident. You linger, battling for life, and cost your family several thousands of dollars. If gangrene should set in, and a doctor whacks off your leg promptly, payment is in order; if he fights the infection gallantly and loses, the indemnity may be lost.

There are other objectionable features of accident and health insurance, too numerous to itemize, because of the wide variance in policy contracts. But all of the objections do not arise from the policy wordings alone, but from company practices, as well. Insurance commissioners in various states tell me that, despite the comparatively small amount of such business in force as compared to life, property, and casualty coverages, the complaints received upon health and accident matters alone far exceed those in any other insurance field. In Michigan, for example, such complaints constitute seventy-one per cent of the total from all fields. One who is a chiseller in drafting the provisions under which he will perform is generally a chiseller in practice, as well.

One will find, therefore, that such companies will grasp at every possible opportunity to assert a policy defense; they will pay less than what is honestly due, they will tender back premiums and claim that the policy was void, for some cause, from its inception; or they will simply deny liability, knowing that the majority of policyholders will curse them but not file suit. If suit is filed, they will haggle with his attorney and usually delay matters as long as possible. And, occasionally, they will follow tactics of exhausting the funds of such persons by appeals—and using threats of such expensive procedures to intimidate attorneys advancing claims upon other policies. The mail order insurance business has come to represent a gigantic fraud, such companies (at least until recently) being immune from suit except in the state where incorporated.

As an illustration of tactics which may be employed, Roberta Davis (fictional) had a "Lifetime Income Protection Policy" with the X company.

The policy contained no standard provision number 16, which is the provision permitting the insurer to cancel the policy. Under a payment of premium provision, it provided for continuance of protection by payment of the premium at due date "and acceptance by the company". In the meantime, the insurer sent premium notices to Mrs. Davis each time premiums fell due and she, as promptly, sent in her check, coming to rely upon this practice. Finally, however, after paying some fifteen premiums, she had a small loss. The company, after paying this loss, decided it wanted to get rid of her—but the question was "How?" There was no cancellation provision giving the company the right to cancel. So, cleverly, it withheld sending a premium notice to her the next time a premium was about to fall due. Sure enough, relying upon the notices as she did, Mrs. Davis overlooked making payment and shortly thereafter had a severe heart attack. The company said, "That's too bad, but you didn't pay your premuims."

The unfortunate part of all this business is that people must make their plans for both life and death in reliance upon business and personal contracts, including insurance contracts. They are far better off to have no insurance than to believe they have a certain protection which does not exist. In the first case, not only would millions of dollars of premiums be saved by those policyholders but there would be no misplaced reliance—and one could establish a personal savings program to meet the potential need.

What, then, is the solution? As I see it, there are two possible remedies. Both of them lie with the individual states. One is to make the writing of health and accident insurance illegal per se—to abolish the field entirely. The second would be to adopt drastic legislative restrictions as to what must be included in and what shall not be excluded from such contracts, and to invest the insurance commissioner with broad powers to revoke the licenses of chisellers. It is up to attorneys and to private citizens to see that proper legislation is passed and that appointive officials exercise such powers in the public interest. The insurance business will not clean up itself. Chisellers will not voluntarily go out of a profitable business, any more than a confidence man will desist from his nefarious practices except by reasons of force or fear.

It will be shouted by companies and agents, "Premium costs will skyrocket if we take out our exclusions and write a straightforward policy, with no jokers." So what? I'd rather have twenty-five dollars a week I knew was coming in than one hundred dollars potential where the company could escape payment three times out of four. We're all willing to pay for what we get, but we object to paying for that which the agent promises and the company doesn't deliver. We object to fancy language designed for the protection of unscrupulous companies. For we have learned, the hard way, that "jokers cost money"!

FORUM NON CONVENIENS

*Ben F. Cameron**

Prior to June 25, 1948, venue was considered the prime prerogative of plaintiffs—a precedence belonging almost within the purview of Mr. Justice Holmes' dictum in *Healy v. Sea Gull*[1] that "The plaintiff is absolute master of what jurisdiction he will appeal to . . ."

By the passage on this date of 28 United States Code 1404(a), venue was removed from the unfettered option of either party, defendants were admitted to a voice in its selection, and final choice was committed to the discretion of an impartial tribunal. The section, appearing in the chapter on venue, is as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

While the right to change of venue was new both to the Judicial Code and to federal jurisprudence, the principles which gave birth to the new statute were not new. The congressional committees which spent five years studying the problem[2] had the benefit of a number of law journal articles[3] treating of the history and scope of the doctrine of *forum non conveniens* and also of the series of decisions of the Supreme Court unfolding and expounding that doctrine. Intelligent interpretation of the statute is hardly possible without knowing something of the history of that development and of the conditions which led to it.

Abuse of Liberal Venue Provisions

The Reviser's Notes[4] pointed out the bringing of personal injury suits under the Federal Employers' Liability Act in jurisdictions remote from the place where the accident happened and from the residence of the plaintiff, as an example of the need for reform, and that category of cases may be taken as illustrative of what moved Congress to the passage of the Act. By 1947,[5] eight hundred and forty-two such migratory suits per year were being filed. Ninety-one percent of them were filed in five states—New York, Illinois, California, Minnesota, and Missouri. During a five

---

*Attorney at Law, Meridian, Mississippi.

[1]237 U.S. 479 (1915).

[2]Moore, Commentary on the U.S. Judicial Code 200 *et seq.* (1949).

[3]Blair, *The Doctrine of Forum Non Conveniens in Anglo American Law*, 29 Col. L. Rev. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947); Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867 (1935); Foster, *Place of Trial In Civil Actions*, 43 Harv. L. Rev. 1217 (1930).

[4]28 U.S.C.A. § 1404 (1950).

[5]Winters, *Interstate Commerce in Damage Suits*, 29 J. Am. Jud. Soc'y 135 (1946).

year period 1,171 transported suits were filed in Illinois alone, based on causes of action arising in thirty-five states.

Included in those thirty-five states were Oregon, Washington, California, Texas, Florida, and Georgia—eighty involving accidents happening in California, forty-four in Arizona, and thirty-seven in New Mexico.

This practice was concentrated in the hands of a few firms: sixty percent of all Illinois cases were filed by three Chicago law firms; fifty-seven percent of all Minnesota suits were handled by two law firms; and one Oakland, California firm handled all but forty-three of 696 such suits filed in that state.[6]

This handful of lawyers fared right well in the handling of these suits. Figures derived from the estate of a deceased lawyer in a middle-west state showed that, in a two year period, the fees arising from suits disposed of after the attorney's death aggregated $2,075,053.[7]

Evolution of Doctrine of *Forum Non Conveniens*

This imposition on the courts in metropolitan areas where dockets were already congested—not to mention the inroads into the income of local attorneys who normally would have handled the cases—gave rise apparently to a spontaneous resolve on the part of the courts to do something about it. In that, the Supreme Court took the lead by the development and expansion of the ancient but little known doctrine of *forum non conveniens.* Of Scottish birth, rather feebly nourished by the English courts, the doctrine had found lodgment in this country in the jurisprudence of six states.[8] Texas had put it to use before the turn of the century,[9] but its espousal was most earnest in states like New York where imported lawsuits imposed the heaviest burdens on local tax payers, resulting in the passage of a statute somewhat like 1404(a).[10]

Until its recrudescence and reshaping at the hands of the Supreme Court, this doctrine, bearing this "amorphous Latin heading," and falling within the penumbra between substance and procedure, was referred to by Professor Braucher as being one of "absurd complexity."[11]

---

[6]H.R. Rep. No. 1639, 80th Cong., 2nd Sess. 6 (1948). The American Bar Ass'n and Bar Ass'ns of thirty-five states passed resolutions favoring this legislation. Barrett, *The Doctrine of Forum Non Conveniens,* 35 Cal. L. Rev. 383 (1947).

[7]Copies of the estate papers are in the author's possession.

[8]Barrett, *op. cit. supra* note 6, at 389; Braucher, *op. cit. supra* note 3, at 909 *et seq.*

[9]Braucher, *op. cit. supra* note 3, at 914.

[10]Blair, *op. cit. supra* note 3, at 30.

[11]Braucher, *op. cit. supra* note 3, at 930.

Supreme Court Cases

In 1804, Chief Justice Marshall established the doctrine, ever since followed, that an admiralty court might decline to exercise its jurisdiction in a dispute between aliens.[12] In 1923, Mr. Justice Brandeis struck down a statute of Minnesota which tended to facilitate the importation of suits,[13] and adverted, in a footnote, to the pendency in Minnesota of 1,028 personal injury cases brought by non-residents and claiming more than $26,000,000 damages.

In 1929, Mr. Justice Holmes rendered the first decision involving a case under the Federal Employers' Liability Act,[14] in which he sustained the action of a New York state court, applying a New York statute in dismissing a suit by a citizen of Connecticut on an accident happening in Connecticut. The dissents in that case were filed by Chief Justice Taft and Justices Van Devanter and Butler.

In 1932,[15] Mr. Justice Brandeis again showed himself champion of the new doctrine, giving expression to the dictum that "courts of equity and of law also occasionally decline to exercise jurisdiction, in the interest of justice, where . . . for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." He cited, in support, a contemporary article in the *Columbia Law Review* by Paxton Blair[16] treating exhaustively of the origin and development of the doctrine of *forum non conveniens,* as well as several other similar law journal articles.[17]

After holding the following year[18] that the trial court had the right, in a stockholder's suit, to decline jurisdiction "whenever considerations of convenience, efficiency and justice point to the courts of another state," the Supreme Court did not, for a period of thirteen years, give further consideration to the doctrine.

Then followed, in rapid order, a series of decisions which approved and set the limits of the doctrine of *forum non conveniens.* Singularly the doctrine was developed largely in cases wherein its application was denied on factual grounds. In the *Kepner*[19] and *Miles*[20] cases the court denied the right of state courts to decline, under *forum non conveniens,* to hear imported F.E.L.A. cases, on the ground that this federal act carried its own venue provisions which could not be frustrated by state rules of procedure.

---

[12]Mason v. Ship Blaireau, 2 Cranch 240 (U.S. 1804).
[13]Davis v. Farmers' Cooperative, 262 U.S. 312 (1923).
[14]Douglas v. New York . . . R.R., 297 U.S. 377 (1935).
[15]Canada . . . Co. v. Patterson Steamships, Ltd., 285 U.S. 413 (1931).
[16]See note 3 *supra.*
[17]Arizona v. California, 284 U.S. 423 (1931).
[18]Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933).
[19]B. & O. R.R. v. Kepner, 314 U.S. 698 (1941).

And in *Williams v. Green Bay,*[21] the court reversed a decision by Judge Hutcheson, sitting in the Second Circuit,[22] affirming the dismissal by a New York District Court, of a debenture suit involving a Wisconsin corporation, the reversal being based on factual grounds. In these three cases, declining as they did to apply *forum non conveniens,* the opinions of the court and the concurring and dissenting opinions left no doubt that the validity and wide scope of that doctrine were accepted by a majority of the judges.

In March, 1947, a little more than a year before the passage of the statute, the Supreme Court rendered two decisions carrying the evolution of *forum non conveniens* many steps forward. One of the suits, *Koster v. Lumbermans' Mutual,*[23] involved a stockholders' derivative action and the other, *Gulf Oil Corp. v. Gilbert,*[24] was a plain damage suit at law for destruction of property by fire. These two decisions demonstrated that the Supreme Court had embraced the doctrine of *forum non conveniens* and invested it with a scope and breadth and virility not theretofore ascribed to it. Concerning the *Gilbert* case Mr. Justice Black, dissenting with three other justices, stated:

> "Never until today has this court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a law suit . . . Whether the doctrine of *non conveniens* is good or bad, I should wait for Congress to adopt it."

The Supreme Court has dealt with the doctrine in four other cases, one[25] before and three since the passage of the Act. The last three cases,[25] decided May 31, 1949, held[26] that suits under the Employers' Liability Act and under the anti-trust laws were subject to transfer under the new statute.

The Court of Appeals of the Fifth Circuit had dealt with questions relating to the doctrine in one case[27] before the passage of the Act; two[28] immediately after the passage of the Act, considering district court decisions

---

[20]Miles v. I.C. R.R., 315 U.S. 698 (1942).
[21]Williams v. Green Bay. . . R.R. . ., 326 U.S. 549 (1946).
[22]Williams v. Green Bay. . . R.R. . ., 147 F.2d 777 (2nd Cir. 1945).
[23]Koster v. Lumberman's Mutual, 330 U.S. 518 (1946).
[24]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946).
[25]U.S. v. National City Lines, 334 U.S. 573 (1947).
[26]Ex Parte Collette, 337 U.S. 55 (1948); Kilpatrick v. T.&P. R.R., 337 U.S. 75 (1948); United States v. National City Lines, 337 U.S. 78 (1948).
[27]Tivoli Realty Co. v. Interstate Circuit, 167 F.2d 155 (5th Cir. 1948), *cert. denied,* 335 U.S. 837 (1948).
[28]Burges v. Gamble Defense Corp., 172 F.2d 541 (5th Cir. 1949); Amalgamated Ass'n of . . . Employees v. Southern Bus Lines, 172 F.2d 946 (5th Cir. 1949).

dismissing actions under the common law doctrine, and one case[29] arising since the Act was passed. In the first three cases the court referred to the history of the development of *forum non conveniens* by the Supreme Court and recognized it as an accepted procedural reform. In the fourth case, *Atlantic Coast Line v. Davis,*[30] the Court of this Circuit had several important questions before it.

The administratrix of Davis had sued under F.E.L.A. in the District Court of the Southern District of New York, though she was a resident of Florida and the fatal injury had occurred there. After the New York Court had transferred the action to Florida and two trials had resulted in hung juries, the Florida court ordered it re-transferred to New York. The railroad sought review of that order both by appeal with supersedes and by petition for leave to file application for mandamus. Our court held that appeal was improper and dismissed it, that mandamus was proper under the extraordinary circumstances, and that it was doubftul if the Florida court had the power of re-transfer. But it based its approval of mandamus on the finding that the circumstances outlined by the Florida District Court did not justify the re-transfer, as a matter of fact. The Supreme Court denied Judge DeVane's petition for authority to file an application for mandamus to the Court of Appeals.

Some Established Criteria Governing Transfers Under 1404(a)

The factors which should influence the discretion of a court considering dismissal were spelled out by the Supreme Court in the *Gilbert* case[31] and remain the criteria most often used under the statute and embrace these elements:

> Relative ease of access to sources of proof, availability of compulsory process for witnesses and the cost of obtaining them, possibility of view of premises, enforceability of judgment, the convenience of the parties giving weight to the traditional choice of forum belonging to plaintiff, factors of public interest, such as congestion of court dockets, imposition of jury duty upon a community having no relation to the litigation, the satisfaction of the curiosity of citizens having interest in a local controversy, and the desirability of trial in a forum at home with the state law to be applied.

The burden of persuading the judge that transfer is proper is on the party making the motion, generally, but not always, the defendant.[32] The

---

[29]Atlantic Coast Line v. Davis, 185 F.2d 766 (5th Cir. 1950).
[30]*Ibid.*
[31]See note 24 *supra.*
[32]Gulf Oil Co. v. Gilbert, *supra* note 24; Kaufman, *Observations on Transfers,* 10 F.R.D. 595, 605 (1951).

quantum of proof must exceed a simple preponderance even though transfer is a much less drastic remedy than dismissal, and a broader discretion may be exercised in ordering it.[33]

It seems to be generally accepted that 1404(a) is available to the parties after removal[34] *". . . to any other district or division where it might have been brought."*

This language has led to the widest disagreement among the federal courts. There are a number of well reasoned district court decisions,[35] but time will permit examination of decisions of courts of appeal only, of which there are three.

The first in point of time was by the Court of Appeals of the Second Circuit, in which Foster-Milburn Company sought a writ of mandamus against Judge Knight,[36] who had concluded[37] that it was proper to transfer a diversity case from New York to California even though the defendant was not subject to process in California. The Court of Appeals disagreed, asserting that "it is Hornbook law that transitory actions must begin with personal service upon the defendant;" and that mandamus should issue to provent transfer by Judge Knight.

A few months later the Court of Appeals of the Ninth Circuit reached the same conclusion.[38] Quoting freely from the Second Circuit decision last mentioned, that Court held that transfer should be declined unless the transferee forum was one in which jurisdiction of the defendant could be acquired by proper service of process and that "brought" presupposes jurisdiction over the defendant obtainable as a matter of right.

It is noteworthy that both of these decisions involved motions by plaintiffs to transfer, to their own respective domiciles, actions they had begun where service could be had on the defendants.

The third decision[39] furnishes a fuller presentation of the question, involving a motion by defendants to transfer to plaintiff's residence, and embracing also the matter of waiver which seems destined to play an

---

[33]Amalgamated Ass'n of . . . Employees v. Southern Bus Lines, 172 F.2d 946 (5th Cir. 1949).

[34]Headrick v. A.T. & S.F., 182 F.2d 305 (10th Cir. 1950); White v. Thompson, 80 F. Supp. 411 (N.D. Ill. 1948); Chaffin v. C. & O. R.R., 80 F. Supp. 957 (E.D. N.Y. 1948); Moore, *op. cit. supra* note 1, at 204.

[35]Masterpiece Productions, Inc. . . . v. United Artists Corp., 94 F. Supp. 116 (E.D. Pa. 1950); Masterpiece Co. v. United Artists, 90 F. Supp. 750 (E.D. Pa. 1950); Otto v. Hirl, 89 F. Supp. 72 (S.D. Iowa 1950).

[36]Foster-Milburn Co. v. Knight, 181 F.2d 949 (2nd Cir. 1950).

[37]McCarley v. Foster-Milburn, 89 F. Supp. 643 (W.D. N.Y. 1950).

[38]Shapiro v. Bonanzo Hotel Co., 185 F.2d 777 (9th Cir. 1950).

[39]Tivoli Realty, Inc. v. Paramount . . . Inc., 89 F. Supp. 278 (D. Del. 1950); Tivoli Realty, Inc. v. Paramount . . . Inc., 80 F. Supp. 800 (D. Del. 1948).

important part in solving questions arising under this clause in the statute. Tivoli Realty, Inc., a Texas corporation, had sued fourteen corporations in the District of Delaware. Process had been served on all defendants, and all had joined in the motion to transfer to the Texas District.

Judge Rodney held that he was without power to order the transfer to the Texas jurisdiction because five of the defendants were not amenable to process there.

The Court of Appeals for the Third Circuit[40] disagreed, holding mandamus to be proper to compel Judge Rodney to hear the evidence and transfer the cases to Texas if it so warranted. The court leaned to the thought that "brought" and "commenced" were synonymous terms, but based its decision chiefly on the holding that all of the defendants, by joining in the motion to transfer, agreed to submit themselves to the Texas Court. It felt that this conclusion was supported not only by reason, but by the second decision of the Supreme Court in the *National City Lines* case[41] and by the terms of 28 U.S.C. 1406(b).

The Third Circuit Court felt that the decision of the Court of Appeals of the Fifth Circuit in one of these same cases, rendered prior to the passage of 1404(a),[42] was, for that reason, irrelevant to the issues then before it. The court of this circuit had held that these same defendants could not enjoin Tivoli, in its Texas domicile, from prosecuting the Delaware action, under *forum non conveniens,* for the reason that Texas was not an available forum because all of the defendants were not there amenable to process as a matter of right and not merely of grace.

Paramount v. Rodney[43] is the only authoritative holding in which the issues normally encountered were in focus. All seven judges sat in the case, and the tone of the opinion subscribed by five judges, and the dissent of two judges, indicates that no phase of the problem was without its champions. It is inferable that this decision, affording a greater freedom of choice to courts faced with transfer motions, and based on a combination of venue and waiver, is in line with the thinking of Professor Moore, who served as Special Consultant in the code revision.[44]

---

[40]Paramount Pictures v. Rodney, 186 F.2d 111 (3rd Cir. 1950), *cert. denied,* 71 S.Ct. 572 (1951).

[41]See note 26 *supra.*

[42]See note 27 *supra.*

[43]*Supra* note 40.

[44]Moore, *op. cit, supra* note 1, at 202 *et seq.* [Since this article was prepared, the Court of Appeals of the Fifth Circuit has aligned itself with the Courts of the Second and Ninth Circuit (See notes 36 and 38 *supra*) without mentioning the conflicting decision of the Third Circuit (See note 40 *supra*). See Blackmar v. Guerre, 190 F.2d 427 (5th Cir. 1951).]

Conflict of Laws Arising from Transfers Under 1404(a)

Under *Erie v. Tompkins*[45] a cause of action is governed by the substantive law of the state where it arises. Similarly the law of the forum normally governs procedural rights, including such important items as burden of proof, statutes of limitation, and measure of damages. When an action is transferred under the statute, does the trial court follow the procedural law of the convenient forum or that of the transferor forum?

Under the holdings of the Supreme Court that a federal court sitting in a given state is but another court of that state,[46] it would seem that the convenient forum would apply the procedural law of the state in which it sits, and such a conclusion is implicit in a recent decision of the Court of Appeals of the Seventh Circuit in a transferred case.[47]

But the only appellate court to meet the question head-on has held that the convenient forum should apply the procedural law of the transferor forum.[48] The Court of Appeals of the Tenth Circuit had before it a case in which the district court of New Mexico had dismissed Headrick's damage suit, which had been removed from a state court. Headrick was a citizen of Missouri, the defendant railroad a citizen of Kansas, the accident had happened in California, and the suit was brought in New Mexico—solely because the claim was barred by the statutes of limitations of the other available forums. The District Judge felt that the convenient forum was in California where the accident happened and was ready to transfer Headrick's case, but it finally decided to dismiss because it was convinced that the California statute of limitations would be successfully invoked after transfer.

The Court of Appeals of the Tenth Circuit reversed, holding that Headrick's case, if transferred to California as the convenient forum, would remain a New Mexico case "still controlled by the law and policy of that state." Unfortunately the parties compromised that litigation,[49] and this question must remain in doubt.

Are Transfer Orders Reviewable?

Transfer orders, being interlocutory, are not appealable on principle, and the courts have so held. The Courts of Appeal of the Second,[50] Third,[51]

---

[45]Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1937).
[46]Angel v. Bullington, 330 U.S. 183 (1946).
[47]Reynonds v. B. & O. R.R., 185 F.2d 27 (7th Cir. 1950).
[48]Headrick v. A.T. & S.F. R.R., 182 F.2d 305 (10th Cir. 1950).
[49] , *Section 1404(a) and Transfer of Substantive Law*, 60 Yale L.J. 537, n.15 (1951).
[50]Magnetic . . . Co. v. Dings . . . Co., 178 F.2d 866 (2nd Cir. 1950); Foster-Milburn v. Knight, 181 F.2d 949 (2nd Cir. 1950); Ford Motor Co. v. Ryan, 182 F.2d 329 (2nd Cir. 1950).
[51]Paramount Pictures v. Judge Rodney, 186 F.2d 111 (3rd Cir. 1950).

Fourth[52] and the Ninth[53] Circuits have answered the question categorically in the negative, and the Court of Appeals of the Fifth Circuit[54] dismissed the appeal and gave its tacit approval to the non-appealability of such orders. The Court of Appeals of the Seventh Circuit declined to pass on the question on the ground that the evidence did not sustain a transfer.[55]

Review by Mandamus

The appellate courts have shown a marked hospitality to review upon petition for mandamus, so much so that Judge Kaufman[56] refers to such reviews as "perfunctory." The Supreme Court[57] and the Courts of Appeal of the Second,[58] the Third,[59] the Fourth,[60] the Fifth[61] and the Ninth[62] circuits have proceeded to a consideration of, and decision on, the merits upon petition for writ of mandamus or prohibition. The only protest voiced against such a proceeding has been that of Judge Swann of the Second Circuit[63] who felt that the court lacked power to grant such a petition.

Apparently this liberal attitude towards review arises in part from a realization that it would be exceedingly difficult, if not impossible, for a litigant to show that he had been prejudiced by a ruling on transfer so as to merit review of such an order after final judgment.[64]

Volume of Transfers Under 1404(a)

There have been surprisingly few transfers since the effective date of Section 1404(a). Out of more than fifty thousand civil actions commenced in district courts in 1949 and 1950, only 453 were transferred. The greatest controversy has been waged with respect to cases arising under the Employers' Liability Act. Transfers under that Act have been as follows:

---

[52]Clinton Foods, Inc. v. United States, 188 F.2d 289 (4th Cir. 1951); Jiffy . . . Co. v. Stewart . . . Co., 177 F.2d 360 (4th Cir. 1949), *cert. denied,* 338 U.S. 947 (1949).

[53]Gulf . . . Co., v. Harrison, 185 F.2d 457 (9th Cir. 1950).

[54]Atlantic Coast Line v. Davis, 185 F.2d 766 (5th Cir. 1950), *cert. denied,* March 6, 1951.

[55]Christopher v. American News Co., 176 F.2d 11 (7th Cir. 1949).

[56]Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F.R.D. 595, 597 (1951).

[57]See note 26 *supra;* see note 66 *infra.*

[58]See note 50 *supra.*

[59]See note 40 *supra.*

[60]Clinton Foods, Inc. v. United States, *supra* note 52.

[61]See note 29 *supra.*

[62]Gulf Research & Development Co. v. Harrison, *supra* note 53; Shapiro v. Bonanzo Hotel Co., *supra* note 38.

[63]Ford Motor Co. v. Ryan, *supra* note 50.

[64]Atlantic Coast Line v. Davis, *supra* note 54; see note 5 *supra.* It will be observed that the Court of the Second Circuit, in the cited case of Magnetic v. Dings, *supra* note 50, advanced the novel theory that the transferee court could review, on hearing after final judgment, the correctness of a transfer order.

In 1949, 944 cases were commenced and 33 transferred—3.49%;
In 1950, 1085 cases were commenced and 86 transferred—7.92%;
In the first half of 1951, 489 cases were commenced and 12 transferred—2.45%.[65]

The decrease in actions and transfers in F.E.L.A. cases in the Federal Courts has been accompanied by a marked increase in suits filed in state courts. Lawyers engaged in importing suits from distant states have entered the state courts in increasing numbers, feeling doubtless that dismissals could not be obtained under *forum non conveniens,* by reason of the *Kepner* and *Miles* decisions of the Supreme Court.

That question has recently been brought to test and the Supreme Court held the *Kepner* and *Miles* decision not applicable to F.E.L.A. cases in state courts. It reversed a decision of the Missouri Supreme Court, holding itself under compulsion of the *Kepner* and *Miles* cases to refuse dismissal, under *forum non conveniens,* of imported F.E.L.A. cases.[66]

Efforts to Amend 1404(a)

There are ten or more bills pending in Congress[67] proposing to amend Section 1404, and practically all of them are aimed at excluding the right to transfer cases brought under those federal statutes (twenty-five in number)[68] providing their own venue and vesting in plaintiff a choice of forum. These amendments would have the effect of limiting the application of Section 1404(a) to diversity cases. The Committee of the Judicial Conference of the United States, headed by Chief Judge John J. Parker of the Fourth Circuit, has studied these proposed amendments and devoted six pages of its report to an analysis of Section 1404(a) and the proposed changes. The committee recommends against the proposed amendments.[69]

Conclusion

Section 1404(a) represents, in the eyes of some, a codification of the doctrine of *forum non conveniens;* others call it a revision of that doctrine. It is, in any event, a step in a salutary evolutionary process aimed towards bringing venue more under the control of the courts.

---

[65]Report of Committee on Jurisdiction and Venue of the Judicial Conference of the United States, p.27 and attached table no. 5.

[66]Missouri, ex rel Southern R.R. v. Mayfield, 340 U.S. 1 (1951), *reversing* 224 S.W.2d 105 (1950).

[67]H.R. 7585, 7636, 7640, 7642, 7841, 7868, 7885, 7893, 8019 and 270; Report of Committee, *supra* note 65.

[68]Report of Committee, *supra* note 65, at 26.

[69]*Id.* at 29.

State Bar Section

THE CRISIS OF OUR TIME*

William N. Ethridge

A graduation talk to young lawyers must travel a perilous channel between the rocks of a too familiar discussion of tricks of the trade, and on the other hand, pointless generalities on life and morals. Everyone uses the words "theoretical" and "practical", but few know what they mean. For many, "theoretical" means visionary or even mystical, and "practical" means something that works, that has an immediate cash return. This is only partially true. The practical has to do with what works in some way, at once or in the long run. The theoretical concerns something to be seen or understood. My comments this morning will be both practical and theoretical. I will view with alarm, but I will not point with pride, because the civilized world is probably closer to disintegration today than at any time since the fall of the Roman Empire.

The crisis of our time is not military, political, or diplomatic. Those factors are only characteristics. The crisis is of a different nature. The symptoms of our present dilemma are many and exist in numerous areas of our national and international life. I want to discuss those symptoms, and then to outline briefly the forces of clarification and unification which we have and which could resolve our paradoxical situation.

In *Dennis v. U. S.*,[1] the United States Supreme Court affirmed the conviction under the Smith Act of eleven leaders of the Communist Party of the United States for conspiracy to organize that party as a group to teach and advocate the overthrow of the Government of the United States by force and violence. The Court held that the statute in question, as applied, did not violate the First and Fifth Amendments, and that whether there is a clear and present danger of a substantative evil under the facts is a question of law for the trial court and not for the jury to decide. In holding that the clear and present danger rule must not be inflexible, Chief Justice Vinson, speaking for the Court, said that speech is not an absolute beyond the control of Congress. He then commented:

> "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. . . . all concepts are relative."

---

*An address delivered by Supreme Court Commissioner W. N. Ethridge of Oxford, Mississippi, to the graduating class of the University of Mississippi School of Law, August, 1951.

[1]341 U.S. 494 (1951).

The decision itself is correct, yet ironically enough the statement of the Chief Justice is unintentionally revealing, and symptomatic of the pervasive materialism of today. It misinterprets the moral and intellectual basis of the statute and of the Bill of Rights. It is rather shocking when the Chief Justice of the United States says in effect that our society has no moral criteria and basis, that such standards mean nothing when disassociated from other considerations, and that everything is a matter of opinion. The Court missed an ideal opportunity to restate forcefully the moral foundation of the statute and of this government.

In the same manner the American people are failing to maintain in our national life the high standards of right and wrong which have always served as a bulwark of strength. We forget too frequently the basic virtues and principles. Man is a moral, rational and spiritual being. Preoccupation with material goods will hinder his progress toward his real goal, the fullest development of his specific powers. The law of human beings is wisdom and goodness, not unlimited acquisition of material goods. There is a difference between truth and falsity, good and bad, right and wrong. Truth, goodness and right are objective standards even though they cannot be experimentally verified. They are not mere Sunday School tags. And man can discover truth, goodness and right by the exercise of his reason. The moral and intellectual powers of men are the powers which make them men, and man's chief aim on earth is to glorify God by the fullest development of those powers. The dominant influence in the lives of our ancestors was a belief that some people seem to think is hopelessly old fashioned, and others declare to be absolutely false; that there is a God, that man has a soul, and that things of the spirit are in the end the deciding factors in the life of mankind. These propositions and ideas are the basis of our Declaration of Independence and our Constitution.

Moreover, these truths are equally important in domestic government and international affairs. Nationally, we should expect and obtain from public servants high ethical standards in the administration of governmental business. In that respect it is an internal domestic matter. But the question of the moral strength of our people has grave implications also in our international relations. If you are going to defend demorcracy, you must know what you are willing to fight for. If you are going to defend the principles of democracy, you must know what your principles are and why you hold them. Our ability to answer such questions is more important than the quality or quantity of our Army, Navy, and Air Force. Moral and intellectual stamina are the crucial issues. Toynbee, in his great historical study, demonstrated that most major civilizations have been destroyed, not as a result of external aggression, but as a consequence of domestic corruption. A nation can recover quickly from physical or economic disaster, but when its moral convictions weaken it becomes easy prey for the demagogue and the charlatan.

Yet in recent years there has been an appalling deterioration in our moral standards and convictions. We are all aware of it. Almost every publication one reads today has something about it: Time Magazine, the Cleveland Press, speeches of Senator Fulbright, Life Magazine, The Atlantic, etcetera. We are aware of a national illness, but its symptoms are indefinite and its treatment obscure.

In the field of politics and government there are the revelations by the Senate Investigating Committee of alleged sales of post office jobs in Mississippi. Another Senate Committee has made documented charges of corruption in the Bureau of Internal Revenue. The Senate Subcommitee on the Reconstruction Finance Corporation uncovered numerous abuses of the lending functions of that agency, such as the use of Federal funds to bail out bankrupt corporations and the employment by a borrower of an R.F.C. employee who had recommended the granting of the loan. Employees with considerable influence in the executive department have accepted from persons seeking governmental favors and assistance deep freeze boxes, mink coats, and free lodging in resort hotels. The President's personal doctor speculated in commodities at a time when the government was buying food for Europe.

The hearings and findings of Kefauver's Senate Committee on Crime in America raised the log for a view of the vermin in the underworld of crime. Its startling revelations show two basic facts: crime in America is organized on a national basis of tremendous size and complexity, and in many communities in the nation it is tied in intimately with political machines and individual politcians. The widespread traffic in drugs, also examined by this Committee, is only one aspect of the problem of law enforcement.

The recent findings of the Committee on Un-American Activities, concerning Communist infiltration into the personnel of government agencies, shows an astonishing degeneration in moral standards among the left-wing intelligensia. The conviction of Alger Hiss of perjury while connected with espionage activities as an employee of the State Department, opened the eyes of many trusting citizens.

In our colleges and universities, where the characters of our young men and women are being molded, emphasis has shifted from education to football and basketball, at least for half of the school year. This is a defect in our institutions of higher learning with which everyone is familiar. Many colleges have become so intent upon winning football and basketball games that they use any means to gain their ends. They hire players who are not bona fide students and thus make a farce of the whole concept of amateur sport for the health and entertainment of our young men. They corrupt not only the hired players, but also the entire student body, who learn from their elders. This practice has had its logical sequel

in the athletic scandals of the past year. It led naturally to betting and to the shocking and widespread bribery of basketball players in New York, including many of the players on championship teams for the past few years. Another sequel was the recent dismissal from West Point Military Academy of about eighty cadets, for cheating on examinations. This included most of West Point's fine 1950 football team. It is difficult to blame the players. They were corrupted by the college officials and alumni of these schools, who practiced the cynical, immoral doctrine that one must win at all costs.

Many of the problems of misconduct by government employees are beyond the reach of the law, just as much of the evil of the world is beyond the law's grasp. Here the issue is often that of minimum standards of ethical conduct. As Senator Fulbright recently asked:

> "What should be done about men who do not directly and blatantly sell the favors of their offices for money and so place themselves within the penalties of the law? How do we deal with those who, under the guise of friendship, accept favors which offend the spirit of the law but do not violate its letter? . . . Scandals in our government are not new phenomena in our history. What seems to be new about these scandals is the moral blindness or callousness which allows those in responsible positions to accept the practices which the facts reveal. It is bad enough for us to have corruption in our midst, but it is worse if it is to be condoned and accepted as inevitable."

Among many influential people, morality has become identical with legality. But we are in a tragic plight if the accepted standard by which we measure the integrity of a man in public life is that he keeps within the letter of the law.

I have stated the problem, and pointed out numerous symptoms or indicia of the crisis facing us now. The crisis in America is one of a serious decline in the moral strength of the people and of our government. It is a moral, intellectual, and spiritual problem. With an excess of material goods, many millions of people are in poverty. Even with television we are no happier than we were before it. With a declining death rate, we have yet to discover what to do with our lives. With a love of liberty, we see much of the world in chains to the Soviet Union. With a hatred of war, we are now engaged in what is perhaps the beginning of the greatest war in history.

Why is this so? Why is the U. S. air of 1951 saturated with moral doubt, moral scandal, and moral confusion? Why has a moral deterioration set in among us that brings corruption, loose behavior, dulled principles, subverted morals, easy expediencies, sharp practices? I do not think that the cause begins with World War I or II, or with the industrial age and

the assembly line, or with the great depression of the 1930's, or with the positivistic philosophers, or with failure of American universities to teach the "great books." It is because we have directed our lives to means instead of ends. We have been concerned with the transitory and superficial, instead of the basic and enduring problems of life and society. How can you have an effective democracy unless its citizens know and are interested in what the nature of man and the ends of life are? Yet for better than fifty years our intellectual leaders, including those in law, have been telling us that man has no moral and intellectual basis. There is nothing but opinion, they say; there is no difference between good and bad; there is only a matter of degree, the difference between expediency and inexpediency. The aim of human beings is material comfort.

Most people have no firm convictions about anything. They question the precepts of God and of man, indiscriminately. For example, the current scandals in our national government usually get a reaction of a growing disgust with government, with the specific institutions and processes of government as such—not just with the individuals involved. Also there is a widespread, rather cynical attitude of "what-the-heck-can-you-expect", and a feeling that nobody can do much about it.

This materialism is reflected in our educational system, politics, books, theater, newspaper, movies, radio and television, athletics, the way we behave, the values we fix, the interests we have. I don't want to cry wolf any louder than necessary, but if we don't look out, we will unwittingly come to accept the totalitarian concept that the end justifies the means, and the evil and insidious materialism of the Communists is more dangerous to us than their guns. What can we do about it? What forces of unification and clarification are available to combat this materialism and this decline in the moral standards of our social and political life? I will state briefly a few suggestions.

First, there is our *educational system.* Secondary schools should have more instruction of students in non-denominational principles of morals and Christianity. The United States Supreme Court erred seriously, I think, by forbidding in the *McCollum* case[2] any teaching of the Bible in public schools. Faith in God is the basis of our government and our lives. Certainly to bar nonsectarian discussion of the subject in public schools is a misconstruction of the First Amendment. In our colleges and universities, the changes must be even more drastic. A complete reorganization should be had. Athletics should be made non-professional, and de-emphasized. Metaphysics and philosophy should unify the modern university. Education ought to emphasize the cultivation of permanent values, such as intellectual honesty, love of truth, ability to think clearly, and the moral qualities. For many generations this was the cultural

[2] Illinois ex. rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

heritage of young Americans, but the elective system, skepticism, and materialism have removed it. These suggestions with reference to higher education are substantially similar to those of Robert Hutchins, although I cannot agree with him that the "great books" should be made the basis of the curriculum. Yet certainly our educational system, both secondary and college, should be a major force for renovating our national culture.

The *home* should be another important factor of unification in our democracy. In his home the child should obtain fundamental instructions in morals and discipline, yet few persons would claim that today it is performing that function. The parents' neglect is reflected in the child's difficulties and the adult's dilemma. The divorce rate is higher than ever before; one out of every three marriages in America terminates in divorce. Yet we retain the antiquated adversary concept of divorce, although a few states have begun to recognize that more than half of the divorces can be prevented by a careful study of the causes of the separation, together with sympathetic assistance by psychologists in removing those causes. The system used in Ohio should be studied by other states. The American home should again become a dominant influence in the development of young citizens, as it was in the Nineteenth Century.

Thirdly, we need to renew our faith in God and the principles of the Christian religion. Too many people do not believe anything with conviction. The values which were clear to the founding fathers have become dim. The men who have been able to transcend their times and make their lives an inspiration to succeeding ages are the men who have obtained their support from eternal things. The great lawyers of all times have been men of deep religious sensibilities. The basic concepts of the law are founded in religion, and upon the idea of a direct relationship between men and a supreme God. Yet this great tradition in the law has diminished, as it has in the balance of our national life. Natural law is thought of as an antiquated philosophical system, not as the basis of an equitable administration of justice. Moreover, the churches, both Protestant and Catholic, have a responsibility for this decline in the faith of our fathers. Too much complacency and too much sugar-coating of Christianity and the facts of life are primary causes. We must restore and strengthen our belief that there is a God, that man has a soul, and that the things of the spirit are the deciding factors in the life of mankind. This will inevitably result in the recovery of a sound sense of plain, old-fashioned right and wrong, and a capacity for public indignation, which has largely been lost.

A reorganized educational system, a new vigor in the American home, and a renewed faith in God and the principles of Christianity are the forces of unification and salvation which are available. The alternative is the ultimate destruction of our free democratic society. Perhaps some of you will think it is improper for me to say these things, but I did not come to

this gathering of my friends and former students to discuss the ordinary platitudes. I am prepared to be called naive for advancing these suggestions. Yet I say that they are fundamentals which must be considered by all citizens, and which are essential to an effective continuance of our way of life.

The issue is squarely joined, and you men have a responsibility to bear witness to these historic, fundamental beliefs and faith. In office practice, in the courts, in the legislature, in all positions of public authority and private trust, and in the church to which you belong, you must do everything possible to ensure that the faith of our fathers shall continue to be your guide and touchstone. And you are bound to see that your own conduct is worthy of those beliefs. Are you prepared to meet this challenge as your forefathers would have met it? I think and hope that you are, and that you will not be faithless to the past or future. The moral crisis of Western civilization must be met with determination, energy, unselfishness, humility, and faith in the divine purpose of man.

You may think the task is too great. It is stupendous, but not insuperable. You may say that one man's efforts are too insignificant. They are small, but the aggregate of all our efforts might be effective. I am not optimistic, yet we have the capacity, if the faith and will exist. And, as William the Silent said: "It is not necessary to hope in order to undertake, or to succeed in order to persevere."

PRACTICE-HINTS FOR THE YOUNG AND A REMINDER FOR THE OLD

*Lester Clark**

The need for an article of this kind has been vividly called to my attention during almost nine years that I have served as Chancellor of the Tenth Chancery Court District, having served in ten different counties, and after having tried approximately 15,000 cases.

This article is written principally for young lawyers who are starting into the practice, and the original thought of the article was to suggest "ten things for young lawyers *to do* when he begins the practive of law, and ten things for a young lawyer *not to do* when he begins the practice of law", but I hope that it will also be of some benefit to the older lawyers.

We shall first discuss the bill of complaint.

The bill of complaint should never be prepared and filed until the facts of the case have been fully investigated and thoroughly analyzed by the solicitor, a study of the principles of law bearing upon the case carefully considered, and the parties to the suit and the venue determined. Then the solicitor may proceed to prepare the bill of complaint.

The first part of the bill of complaint is the caption, as: IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI, giving the term of court to which it is returnable. If it be in vacation, state IN VACATION immediately below the county and state. This is followed by the style of the case—that is the name of the complainant and the name of the defendant and a place for the cause number. You would be surprised what a large percentage of the lawyers in my district overlook inserting the cause number on the office copy of their bill of complaint when the suit is filed, and therefore every pleading thereafter comes to the court with a blank cause number to be filled in either by the clerk or by the court. May I, then, at this point especially urged all young lawyers to start off your practice with the habit of getting the cause number when your bill of complaint is filed and insert it on your office copy. Each pleading or decree thereafter should also bear the cause number, and should not be presented to the court with the cause number in blank. The time lost by a court that handles a large volume of business in looking up and inserting the cause numbers far exceeds anything that the practicing attorney, as an individual, would dream possible.

The next part is the title of the pleading, which is, Bill of Complaint. The next is the address to the court, and, of course, it is proper to address the *court* and not the individual judge sitting for the very good

*Chancellor, Tenth Chancery Court District of Mississippi.

reason that the court goes on and on, and the judge presiding may be there today and not there tomorrow. In addition, we have a statute that requires the address to be made to the *court* and not to the *judge* presiding. A large number of attorneys in Mississippi still use the old practice of addressing the bill of complaint to the chancellor presiding instead of: "TO THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI," or whatever county it happens to be. Remember, it is the *chancellor* in vacation and the *court* in term time.

The next step is the introduction, which immediately follows the address and is the opening paragraph of your bill. This part of the bill introduces to the court all of the parties, both complainant and defendant, giving clearly not only their names but also their respective places of residence and the capacity in which each sues or is being sued if the same be other than in individual rights or liability. If any of them be an infant or non compos mentis this must also be stated. The domicile of a corporation must be stated, and partnerships sue and are sued in the names of the individual partners. It is very important that the solicitor be very accurate in giving the correct names and residences of the parties; (1) for jurisdictional purposes, and (2) so that the sheriff or other officer may serve the defendants with proper process.

I like to think of a bill of complaint as having three essential parts. I have found it easy to remember these essential parts, and have had occasions to pass this thought on to many young lawyers coming into the practice since I have been on the Bench. They are: (1) that the defendant owed the complainant a duty; (2) that the defendant has breached that duty; and, (3) that damages or injuries resulted. Therefore, after introducing the parties to the court in the introduction of the bill, the next part is the *stating* part which should state the facts sufficiently to show that the defendant owed complainant a duty to do or not to do certain things. This statement should contain a clear, concise statement of the facts on which you rely on this point. This should be followed by a clear, brief statement of the damages or injuries that resulted because of the defendant having done or failed to do the thing charged in the paragraph above. The *stating* part of the bill should, therefore, state the facts so clearly and aver the material facts, and each essential step of the facts, that the court may by a glance at the bill, or after hearing the bill read, know exactly what kind of decree the court would render, if the bill was taken as confessed, and so that the defendant may know exactly and definitely what he is called upon to answer and defend. Please do not put blank day of blank, or blank amount of money in any bill or pleading. Blank day of blank means nothing whatever to a court, and much valuable time is lost because of the carelessness on the part of some solicitors who evidently begin preparing their bills before proper investigation and prep-

aration has been made. Proofread your bills; especially land descriptions, dates, books and pages and exhibits. In divorce bills the date of marriage and separation, the race of the parties, and names and ages of minor children should be given. Because of the carelessness of the solicitor I have had bills of complaints in divorce cases that charged that the parties were of the negro race when as a matter of fact they were of the white race; and I have had bills that would charge that the parties were of the white race when in truth and in fact they were of the negro race. I have also had many serious discrepancies in dates of marriages and separations which would involve the legitmacy of children, if not detected and corrected. During a recent term of court, an error was made by the solicitor in the bill which, according to the bill, showed the first child to be born six years before the parties were married, when in truth and in fact the first child was not born until about two years after their marriage. I consider mistakes of this kind serious, because such mistakes can do serious injury to innocent clients and their descendants. I therefore cannot urge too strongly that you first get the facts and then carefully and accurately incorporate them in your bill. Do not repeat in your bill. State each set of facts only once. Do not use strong, harsh or scandalous language in the statement of complainant's case unless absolutely necessary under the particular state of facts. State only relevant and material facts that are pertinent to the case. Do not charge the defendant with adultry in divorce cases if the defendant is guilty of other grounds that would be less harmful to the relatives of the defendant. In other words, choose the lighter of the offenses if thereby you can obtain the same results or the same relief. Plead facts and not conclusions. Use correct terminology: averments in chancery, allegations in law court, solicitors in chancery, attorneys in law courts.

The bill by all means should be set off in paragraph and each paragraph should be numbered consecutively through the entire bill so that the defendant can intelligently answer or deny each paragraph. Use regular legal size bond paper, not letter size or onion skin. Sign all pleadings in ink.

The next and last part of the bill of complaint is the prayer. It should include the prayer that the bill be received and filed, that process issue to the defendants (if the defendants have been properly named in the introduction of the bill of complaint it will not be necessary to repeat their names in the prayer), and that relief be granted for each item set out in the bill.

A solicitor should always check his process personally before presenting the matter to the court. This matter has been the cause of many solicitors being embarrassed in court, for, when the court personally ex-

amined the process it found that the sheriff had made the return, but the return stated: "After diligent search and inquiry I have been unable to find the defendant, etc." The solicitor had glanced at the process and thought the return showed "personal serice," but he did not examine the return closely enough. Therefore, check your process carefully before presenting your case to the court. If your process is by publication be sure to state, under oath, "that the defendant is a non-resident of this state whose postoffice and street address is . . ." or is "unknown after diligent search and inquiry, etc.", and that your proof of publication is on file in the cause.

The fiat, incidentally, is a part of the bill of complaint, but may be on a separate sheet of paper. There are three essential parts of a fiat: (1) the time; (2) the place; and, (3) before whom. It is a very short fiat or order from the chancellor addressed to: THE CHANCERY CLERK OF THE COUNTY OF_____, ordering him to issue process as prayed for in the bill or petition, returnable before the undersigned chancellor at a certain time and place to show cause why the relief prayed for should not be granted, etc. I have noted that many of the young lawyers coming out of the University Law School, and other law schools, are not familiar enough with fiats. Fiats are used extensively in the chancery court.

There is now available to the lawyers and judges in Mississippi the new edition of Griffith's *Mississippi Chancery Practice,* which will give you a detailed discussion of every angle of the bill of complaint, as well as all phases of equity pleadings. I cannot recommend this work too highly.

May I further suggest the following ten things for you *to do*:

1. Prepare your case thoroughly.

2. State only facts that you can prove.

3. Always admit in your answer those facts which you know to be true.

4. Always admit deraignment of title as to transfers not controverted.

5. Return all court files promptly when you have finished with them, and always return them on or before the opening day of any term of court.

6. Name your paper. "Decree Dismissing without Prejudice. "Decree Overruling Demurrer. "Final Decree of Divorce. "Decree Awarding Temporary Child Support, Attorney's Fees, etc."

7. If you file a demurrer by one or more defendants state: "Separate Demurrer of John Doe, and Minnie Doe, etc." In cases where there are

a large number of defendants or complainants or both, this practice is most desirable.

8. In preparing a decree state first the pleading on which it came on for hearing as: "Bill of complaint, personal service of process, answer, or waiver or process by publication within the time and manner required by law," and recite the general jurisdictional facts so that if the court file is lost, and often times they are after many years, the decree will be sufficient within itself.

9. Always address your remarks to the court and not to opposing counsel. This makes for proper decorum in court.

10. Be a good loser. Any one can be a good winner. If the wrong decision has been reached the Supreme Court will reverse and render, or reverse and remand.

May I further suggest the following thing *not to do*:

1. Do not assume an arrogant attitude. Be professional and genteel. Remember, the litigants, the jurors, and the spectators are your prospective clients, and your only way to advertise is the way you prepare and present your cases in court.

2. Do not become too informal in court. Keep on your coat. Under no circumstances should you come to court without a tie.

3. Do not talk or tell jokes to others while you are waiting for your case to be called. Be quiet. Extend the same courtesies to the court, the lawyers, and the witnesses that you expect while you are presenting your case. Often times a solicitor awaiting his term will tell a joke to some other solicitor and cause a laugh which disturbs the witness, or cause, the solicitor examining the witness to think they are laughing at him, or causes the court to think they are laughing at a ruling he has made. You are an officer of the court. It is your duty to be quiet and try to keep others quiet while court is in session.

4. Do not deny the existence of a deed or other instrument recorded in a certain book and page unless you know by examination it isn't there. You may deny the validity of the instrument, but not the existence.

5. Do not submit consent decrees to the court unless approved by counsel on both sides.

6. Do not abuse any witness, and especially a woman witness. No one wants to see a solicitor abuse a witness. Be courteous but firm.

7. Do not permit your client to subpoena a large number of witnesses unless you or some member of your firm has personally examined them to see that their testimony will be material and pertinent. Screen your

witnesses before having them subpoenaed. About three or four witnesses on any one point in chancery is sufficient, as a rule. I have seen great hardships caused by the failure of solicitors to do their duty in this regard. Unreasonable cost bills have accrued because clients subpoenaed in one case about a hundred witnesses and only four or five knew anything except hearsay.

8. In citing a case never try to mislead the court or counsel on the other side. You will be caught if you do and the court and all others present will lose respect for you. Read the good and the bad in a case and try to point out to the court the most favorable part on your side.

9. Under the uniform rules of chancery your contract in tort actions should be not more than fifty percent of the amount recovered above the amount offered the client before you were employed in the case. I had an actual experience once where $10,000 was offered the client in settlement before a solicitor was employed. The solicitor, after filing suit, got the amount of settlement raised to $15,000, and insisted on fifty percent, which would have reduced the amount due the client to $7,500. The client would, of course, have lost $2,500 by employing competent counsel. This is the only fair basis for any contingent fee contract in any court, and cannot be justified on any other basis.

The space allotted me will not permit me to go further. I trust these suggestions may be of some help to the younger members of the Mississippi Bar.

NOTES

ADOPTION PROCEEDING IN MISSISSIPPI AND SUGGESTED REVISION

Adoption, in legal contemplation, is the act by which the parties thereto institute the relationship of parent and child between persons not so related by nature.[1] It is evident that adoption is not a recent innovation, in view of the fact that it was known to the ancients of Greece and Rome, and probably to other peoples of antiquity. While adoption was practiced among many of the continental nations of Europe under the civil laws from the earliest times, it was unknown to the Common Law of England, and exists in this country only by virtue of statute.[2] Mississippi's Adoption Statute[3] is possibly the most cumbersome and outmoded of the nation, and has remained basically unchanged for almost a century. It is to this ancient and often radically deficient statute[4] that the parentless, abandoned and disowned youth of Mississippi look for help.

Interpretation in the United States

It has been broadly stated that inasmuch as statutes providing for a procedure or method by which one person may be adopted as the child of another are in derogation of the common law, such enactments should be strictly construed.[5] However, in the better reasoned decisions this rule, in its larger aspect, has been substantially abandoned, since such legislation is obviously not intended to supplement the common law, but to make a change in it.[6] The only logical interpretation of such a law should be to give adopted children the same relation to adoptive parents that was given them by the civil law, *i.e.*, to make their legal status the same as that of a natural child.[7]

Parties and Consent

The parties to an adoption proceeding in Mississippi are the person or persons seeking to adopt another and, in the usual case of a minor, the person or persons who have custody thereof—generally the natural parents. It is necessary to allege in the petition the consent[8] of both the parents or

---

[1] 1 Am.Jur., Adoption of Children, § 1.
[2] 1 Am.Jur., Adoption of Children, § 3.
[3] Miss. Code § 1269 (1942).
[4] Miss. Rev. Code (1857) c. 41, art. 41.
[5] Jessup's Estate, 81 Cal. 408, 21 Pac. 976 (1889); Re Knott, 138 Tenn. 349, 197 S.W. 1097 (1917); Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922); Fisher v. Browning, 107 Miss. 729, 66 So. 132 (1914); Roberts v. Cochran, 177 Miss. 546, 171 So. 6 (1936).
[6] Seibert v. Seibert, 170 Iowa 561, 153 N.W. 160 (1915).
[7] Markover v. Krauss, 132 Ind. 294, 31 N.E. 1047 (1892); Cofer v. Scroggins, 98 Ala. 342, 13 So. 115 (1893); Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23 (1893).
[8] Wright v. Fitzgibbons, 198 Miss. 471, 21 So.2d 709 (1945).

guardian unless the child be illegitimate.[9] Further, if the minor be fourteen years of age or over his consent is a necessity.[10]

As a result of the decision in *Roberts v. Cochran*[11] the legislature amended Section 1269 of the Code of 1942, so as to allow the adoption of a child without consent where the parent objecting to the adoption, "has abandoned[12] and/or deserted such infant, or is mentally and/or morally unfit to rear and train it, in either of which cases the adoption may be decreed notwithstanding the objection of such parent, first considering the welfare of the child. . ." The legislature has ample authority with respect to the care, custody, and maintenance of children under its jurisdiction, and it is conceded that a parent has no vested right in his child which requires the same protection accorded to property rights.[13]

In order for a decree of adoption to be constitutionally binding on the parent in those cases where his rights are cut off without his consent, he must have due notice[14] of the proceeding so that he may appear for the purpose of controverting the finding of the court as to him: viz., that he has been guilty of misconduct warranting the decree of adoption without his consent.[15] Most statutes which provide that a child cannot be adopted without the consent of its parents set forth exceptions in the cases of parents adjudged guilty of adultery, cruelty, abandonment, etc., for which a divorce decree has been granted. The mere fact that parents are divorced or separated should not, of itself, however, dispense with the necessity of consent by both parents. The fact of the misconduct, rather than that of the resulting divorce, should form the basis for adoption without consent, and in the absence of fault of the kind enumerated in the statute, the consent of the parent having custody of the child should not be sufficient to sustain the proceeding as against the parent not consenting thereto, who

---

[9]In the case of illegitimacy, Miss. Code § 1269 (1942) specifically provides that, "For the purposes of this act, the father of an illegitimate . . . shall not be deemed to be a parent."

[10]Miss. Code § 1269 (1942).

[11]177 Miss. 546, 171 So. 6 (1936), which held: "Although the father or mother may be unfit to have the custody of their child under our statute it cannot be adopted by another without the consent of both."

[12]For the Mississippi definition of abandonment, see: Wright v. Fitzgibbons, *supra* note 8.

[13]However, the law is most solicitous toward maintaining the integrity of the natural relation of parent and child, and in adversary proceedings in adoption, where the absolute severance of the relation is sought without the consent and against the active protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. *Re* Cozza, 163 Cal. 514, 126 Pac. 161 (1912).

[14]Graham v. Lee, 204 Miss. 416, 37 So.2d 735 (1948).

[15]Child Sav. Inst. v. Knobel, 327 Mo. 609, 37 S.W.2d 920 (1931); In Schiltz v. Roenitz, 86 Wis. 31, 56 N.W. 94 (1893), it was held that as to a father without notice of adoption proceedings, the decree was a nullity, notwithstanding that he had abandoned the child and that consent had been given by a guardian *ad litem*. The court allowed the father to maintain an action for alienation of affections and loss of services of the child.

has not been given notice.[16] In order to be constitutional, adoption statutes must be construed so as to authorize the adoption of a child by strangers only in cases where the natural parents consent to the adoption, or where proof shows that the child has been abandoned by its natural parents, or that it is manifestly to the interest of the child that it be taken from their custody by some judicial proceeding of which they had notice and an opportunity to be heard.

Method of Adoption and Property Rights

It seems well settled that an adoption may be accomplished only by petition and decree[17] from a Chancery Court of the State of Mississippi although in at least one other jurisdiction something similar to "adoption by estoppel" is recognized.[18] The right of heirship is not bestowed on the adopted child unless specifically stated in the adoption decree,[19] with all antecedent agreements between the adopting parents and the child merging in the decree upon its issuance.[20] Once the decree is issued it will be strictly construed and only those gifts specifically designated to the child shall be legally binding. However, recognizing their obligation to protect minors, the court will allow review of the decree to be instituted within two years after the minor reaches majority for the purpose of correcting the decree. If the decree is not reviewed within these two years, it becomes final and the rights are determined by the original decree—notwithstanding the antecedent agreements.[21]

---

[16]*Re* Williams, 102 Cal. 70, 36 Pac. 407 (1894); 1 Am.Jur., Adoption of Children, § 43. The writer has been unable to find any Mississippi case standing for the proposition that a divorce granted on grounds of misconduct, which would uphold an adoption decree without consent, is res judicata upon the petition for adoption. However, it is respectfully submitted that the view advanced in *Re* Williams, *supra*, is most sound.

[17]Moyse v. Laughlin, 177 Miss. 751, 171 So. 784 (1937).

[18]Carlin v. Bacon, 322 Mo. 435, 16 S.W.2d 46 (1929), holding that where a married couple had taken a child from an orphanage under an oral promise to adopt him as their own child and make him their heir, thereby withdrawing him from the sheltering care of the institution and depriving him of the opportunity to be adopted into a home where he would have received humane treatment, and he rendered to them such obedience, service, affection, and attention as are usually rendered to a parent by a child, until driven to leave by ill treatment, equity will enforce their promise to make him their heir, notwithstanding that the statute authorizing the adoption of a child provides no other method than by deed in writing. Further, in the case of Aherne v. Matthews, 337 Mo. 362, 85 S.W.2d 377 (1935), the Missouri court recognized the principle of law that two or more parties who are competent to contract may enter into any agreement or contract they see fit, if it is not in violation of morality and good conscience. An adoption was allowed to be affected by the fact that a child was taken into a family and reared, regardless of the fact that the statutory procedure of adoption was not followed. *cf.* Taylor v. Coberly, 327 Mo. 940, 38 S.W.2d 1055, 1060 (1931).

[19]Whitman v. Whitman, 206 Miss. 838, 41 So.2d 22 (1949); Leonard v. H. Weston Lumber Co., 107 Miss. 345, 65 So. 459 (1914); Beaver v. Crump, 76 Miss. 34, 23 So. 432 (1898).

[20]McLean v. McAllum, 131 Miss. 234, 95 So. 309 (1923).

[21]McLean v. McAllum, *supra* note 20.

As against presumptive heirs of the adoptive parent, whose right of inheritance has been cut off by the adoption, the adoption decree is upheld, although its validity as to the natural parent may be considered questionable.[22] The Mississippi Supreme Court has adopted this view and will not allow an adoption decree to be collaterally attacked.[23]

As has been stated before, the adopted child may inherit from its adopting parents only if the decree so specifies. But, what about a foreign adoption which does not conform to Mississippi procedure? The Mississippi Court in the case of *Fisher v. Browning*[24] first propounded the view that such an adoption would not be honored. However, three years later the same case appeared before the court under the style of *Brewer v. Browning*[25] wherein the court reversed its former decision on several points. The court held that it would be unjust to both parent and child, under an adoption effected by the law of one state in which the parties thereto were given full right of parent and child, to declare that the mere fact of moving to another state would upset and unsettle this relationship. This *Brewer* case settled one other very controversial question: upon the child's death intestate without issue the property received from the adopting parents will "descend to the kindred of that parent *from whom he receives it.*" Therefore, in the *Brewer* case the property received by the child from its adoptive parents went to its adoptive relatives upon its death—to the exclusion of its blood relatives.

In the absence of a provision in the adoption decree that an adopted child cannot inherit from its natural relatives, nothing will be implied to dissolve the natural relationship of kindred, and the statute is not construed as to deprive the child of the benefits arising from such natural relationship.[26] An interesting question could very easily arise over the descent of

---

[22]*Re* Williams, *supra* note 16; Nugent v. Powell, *supra* note 7.

[23]Adams v. Adams, 102 Miss. 259, 59 So. 84 (1912), wherein the court held that in a collateral attack on a decree of adoption it will be presumed, where the court had general jurisdiction, that the petition presented by the infant's mother and adopting father was presented to the Chancery Court of the proper county. Such a decree is not subject to collateral attack though the petition did not show the name of the father or guardian, or whether they were living or their consent had been obtained. In the case of Welch v. Welch, 208 Miss. 726, 45 So.2d 353 (1950), Chief Justice McGehee ruled that the Chancellor has full jurisdiction and authority to determine each petitioner's capacity and competency (relative to sanity) in giving consent and in adopting. The natural parents may not collaterally attack an adoption decree on the ground of fraud when they were parties to the petition and were fully advised of all the facts relief on by the adopting parents.

[24]107 Miss. 729, 66 So. 132 (1914).

[25]115 Miss. 288, 76 So. 266 (1917).

[26]Sledge v. Floyd, 139 Miss. 398, 104 So. 163 (1925); Brewer v. Browning, *supra* note 25, wherein is found dicta to the effect that the adopted child may inherit from its natural parents: "So far as its (child's) rights of inheritance are concerned they probably extend to both families to the extent of entitling it to inherit from both the adopting *and* natural parents."; In re Monroe's Ex'rs., 229 N.Y. Supp. 476, 132 Misc. 279 (1928).

property inherited by the adopted child from its *natural* relatives. Would the property descend to its adoptive, or natural parents? There is no decision on this point, however this writer believes that in such a case the property would revert to the child's natural parents. The reasoning of the court in the *Sledge* and *Brewer* cases tends to uphold the writer's opinion.[27] The rule that an adopted child may inherit from both its adopting as well as its natural parents seems somewhat of an anomaly to the writer. Under the doctrine laid down in the *Brewer* case the property inherited by the child went at its death, intestate, to its adoptive parents to the exclusion of the blood relatives of the child. As a logical conclusion to be drawn from this it would seem that as the fiction of adoption excludes the blood relatives from sharing in the property of the adopted child, *a fortiori* the fiction should exclude the adopted child from its right to share in the property of its blood relatives. The fiction should not be accepted in part and discarded in part. The blood relatives of the adopted child should not be considered legal relatives of such adopted child, and the child should therefore have no legal right to share in the proceeds of the property of such blood relatives.[28] If this is considered a harsh rule at first glance, it can be easily seen that by virtue of the Statute of Wills[29] the natural parents are at liberty to leave the child whatever they wish. However, the Mississippi Court in the case of *Sledge v. Floyd*[30] has laid down the doctrine that an adopted child may inherit from its adoptive and natural parents.

Practical Application as Determined by Field Survey

As is evidenced by the foregoing cases, most of the litigation on the adoption proceeding in the State of Mississippi has been over the descent of property. In every adoption there is an undulating human relationship involving varying personalities which continues from day to day and affects both the parents as well as the child. Does our Adoption Law in any way safeguard the prospective parties to the adoption so that only a mutually satisfactory relationship can be launched? It is respectfully submitted that

---

[27]Sledge v. Floyd, *supra* note 26: "Where a child is adopted and by such adoption made an heir at law of the adopting parents, and receives from the adopting parents property by reason of the artificial relationship, and such adopted child dies without children or descendants, the property would *go back to the channel from whence it came,* and its blood relations would not inherit such property received by virtue of such adoption proceedings." Would it not be logical to assume that upon the death of the child intestate that the property inherited by him from his *natural* parents would *"go back to the channel from whence it came"* to its *natural* parents to the exclusion of the *adoptive* parents? Further, in Brewer v. Browning, *supra* note 25, the court said: "If he (adopted child) dies in infancy and without issue the property under the statutes descends to the kindred of *that parent from whom he* receives it."

[28]Claude F. Clayton, *Adoption—Relation it Creates—Effect on Property Rights in Mississippi,* 3 Miss. L. J. 238 (1931).

[29]Miss. Code § 657 (1942).

[30]*Supra* note 26.

it does not. Although the child placing agencies are doing a wonderful job individually, they themselves recognize a compelling need for further legislation on the subject of adoption. There is a great necessity for legislative aid to provide for more control of private and fraternal adoption societies in terms of licenses, investigations, inspections, etc.

Does the Mississippi law consider the possible use unscrupulous persons have sometimes made of information revealed in adoption cases when court records are not sealed? What are the true motives of the prospective parents who wish to adopt a child? There are people who are prompted to ask for a child in adoption who really want a toy, or something to dominate, or a weapon to use against a wife or husband.[31] There are others who may plan to adopt a child without the real consent, or wholehearted support, of the other spouse.[32] The statute governing adoption should provide for all these contingencies by express statement and by demanding adequate and efficient preliminary investigation, skilled supervision, and a period of probation before the final decree.

What is the average length of time required to effect an adoption in Mississippi? Here, again, there is no set rule. The length of time varies from one to three years, depending on the requirements and flexibility of the application. One other delaying factor that would very probably take its toll is the fact that the average couple will by and large prefer a child of six months to one of six years. Since there are ten sets of would-be parents to every small baby available through legitimate channels, the resulting consequence is that many people are disappointed.[33] It is a perfectly natural desire to want to adopt a small baby and rear it as one's own child. However, there are older children, suddenly thrown on their own, bewildered, much in need of the security of a loving home, who can reward the foster parents with their love and gratitude just as richly as the smaller children, if only given the opportunity.

Mississippi does have a loose, ineffective licensing law; however, compliance cannot be enforced and it does not apply to fraternal or religious institutions. One child placing agency in the state does not require a written application in order to effect an adoption! As a result of the lack of adequate standards and licensing law, Mississippi is most vulnerable to unsound and crude practices at the present. In order to accomplish a more efficient and effective adoption system, there is a crying need in Mississippi for an official agency of child welfare services. A revision of

---

[31]Catherine N. McFarlane, *The Mississippi Law on Adoptions,* 10 Miss. L. J. 239 (1938).

[32]Ruth Carson, *So You Want to Adopt a Baby,* Public Affairs Pamphlet No. 173, 22 East 38th Street, New York 16, New York.

[33]*Id.*

the present adoption laws in conformance with the Uniform Adoption Act[34] is anticipated by this writer.

Striking Features of the Uniform Adoption Act

The Uniform Adoption Act is a short, but concise statement of the general principles of adoption law which is artfully fashioned into eighteen sections. With a few incidental alterations this act could be a most important addition to our system of jurisprudence. One of the most serious deficiencies in the present Adoption Law is the lack of any kind of required investigation by an official agency to assist the court in satisfying itself that the allegations of the petition are true. ". . . the most important development in recent adoption legislation is the provision for investigation by the court or through some persons, agency, or board appointed by the court."[35] Some independent investigative organization should be set up, adequately financed, and given the correlative duty of investigating and ascertaining the true facts relative to every adoption. In the opinion of this writer, the investigative body should express no conclusions whatsoever—merely submit the facts to the Chancellor for his determination.

The Mississippi Adoption Law makes no provision for a trial period in the adoption home.[36] A final decree is given at the hearing if the Chancellor is satisfied, "that the allegations of the petition are true, and that the interest and welfare of the person sought to be adopted will be promoted by the adoption."[37] The Children's Bureau concludes: "Provision for social investigation, for trial period in the home either before a petition is filed or before a final decree is granted, and for state supervision will safeguard the interest of all parties."[38] Providing for a trial period in the home before final decree is granted coupled with adequate investigative procedure, such as that contained in the Uniform Adoption Act, helps safeguard the child and the foster parents from a collapse of the adoption relationship. Such a trial period and adequate investigative procedure would minimize embarrassments brought on by the child being afflicted with feeblemindedness or subject to epilepsy, insanity, or other physical or mental conditions of which the adopting parents had no knowledge or notice at the time of the decree.

Another item which is of utmost importance with reference to the child's welfare is a provision to safeguard the records from publicity. As

---

[34]National Conference of Commissioners on Uniform State Laws, Washington, D.C.

[35]Peck, *Adoption Laws in the United States*, U.S. Children's Bureau, Publication No. 148, 1925, p. 17.

[36]Catherine N. McFarlane, *The Mississippi Law on Adoptions*, 10 Miss. L. J. 239 (1938).

[37]Miss. Code § 1269 (1942).

[38]Peck, *supra* note 35, at p. 26.

has been pointed out, such a clause protects a child, as well as the adoptive parents, from unscrupulous persons who might seek to use items and information from the child's past for their own personal gain. All hearings relative to the adoption should be confidential and should be held in closed court without admittance of any person other than interested parties except by order of the court. Further, all papers and records should be withheld from public inspection except under order of the court in which the decree of adoption was entered for good cause shown. It would seem advisable to cause a new birth certificate to be issued with the new relationship entered thereon, while the original birth certificate could be filed with the records of the court.

The Uniform Adoption Act is most exacting in outlining who are the consenting parties to an adoption decree, and under what circumstances the consent will be required. Adequate protection is afforded the unwed mother from making a hasty decision by providing that consent, in such cases, shall be executed at least two weeks after the birth of the child. The Mississippi Adoption Law is sadly lacking in specifically designating the method of giving consent to the adoption, as well as the procedure in case of abandonment.[39]

Conclusion

The Mississippi Adoption Statute, as we have seen, lacks many of these essential items. The Statute, as a whole, is in great need of revision along the lines of the Uniform Adoption Act. The Department of Public Welfare of the State of Mississippi recognizes this need in their pamphlet entitled *Adoption Survey—1949-1950* in which it is stated that:

> "The fact remains, however, that greater protection can be assured all children being placed for adoption if the legal framework serves to (1) protect the parents, the child and the foster family, (2) aid the court in securing facts upon which to base a decision and (3) protect and preserve the records in the interest of the child."

It is hoped that as the consciousness of a need for a complete service of child welfare in the state becomes realized, the adoption statute will be changed to meet the needs of a more modern and complex society. It is unquestionable that the ultimate beneficiaries of such a revision of the Adoption Statute will be the children, parents, and eventually the state as a whole.

Millard Mundell Bush, Jr.

---

[39]Section 8 of the Uniform Adoption Act defines in detail the procedure in case of abandonment.

APPELLATE REVIEW IN A CRIMINAL CASE OF ERRORS MADE BELOW NOT PROPERLY RAISED AND RESERVED

The General and Traditional Rule

An appellate court is precluded from considering a case, whether it be civil or criminal, if the error made in the trial court is not properly raised and reserved.

An error committed below, depending on its nature and the procedural rules of the particular jurisdiction, may be raised by a motion,[1] a plea, an objection,[2] or a demurrer.[3] In addition to one of the foregoing, an exception[4] or a motion for a new trial, or both, may also be required. Generally, the error, unless patent, must be specified with definiteness.[5] All errors that are not a part of the ancient common law record[6] or the "record proper"[7] must be included within a bill of exceptions[8] and an assignment of errors.[9] Furthermore, a brief must be filed in the appellate court[10] and the points must be argued in the appellate court.[11]

Assuming the error made below has not been properly raised and reserved, because of failure to take one or more of the foregoing procedural steps that may be required in the particular jurisdiction, appellate courts may take any one of four possible views of their capacity to review the error:

(1) The appellate court does not have the power to review the error. This conclusion may be reached by reasoning that the function of an appellate court is strictly appellate; therefore, it cannot consider questions originally, that is, questions not considered below.[12]

---

[1]Miss. Code § 2450 (1942).
[2]Miss. Code § 1639 (1942).
[3]People v. Wiechers, 179 N.Y. 459, 72 N.E. 501 (1904).
[4]Statute of Westminster II, c. 31 (1285); Miss. Code § 1639 (1942) (abolishes requirement of saving or noting exceptions to all things objected to in all criminal cases and certain civil cases).
[5]Friar v. State, 4 Miss. (3 How.) 422 (1839).
[6]Carter v. People, 329 U.S. 173 (1946).
[7]Lewis v. U.S., 92 F.2d 952 (10th Cir. 1937); Addis v. U.S., 62 F.2d 329 (10th Cir. 1932).
[8]McQuillan v. State, 9 Miss. (8 S. & M.) 587 (1847).
[9]State *ex rel.* Suddoth v. Tann, 172 Miss. 162, 159 So. 539 (1935).
[10]Anderson v. State, 8 Okl. Cr. 90, 126 Pac. 840 (1912).
[11]State *ex rel.* Suddoth v. Tann,*supra* note 9.
[12]In 184 Pa. L. Rev. 825, 840 (1936) it is stated: "If the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review. Thus, the term error is given a peculiar connotation in the appellate court. The trial court, in fact, may have erred in a given ruling. But since it was not objected to, the appellate court cannot review it. For the appellate court it is not error. Error for the trial court is one thing; error for the appellate court, another." See Sansing v. Thomas, 52 So.2d 478 (Miss. 1951); Miss. Code § 1945 (1942).

(2) The appellate court has the power to review the error,[13] but it will not exercise it. Some of the reasons usually offered for this refusal to exercise the power are:

(a) Considerations of fairness to the opposite party compel this procedure, since the other party might have been able to obviate the error if it had been called to his attention at the proper time.

(b) Considerations of fairness to the trial court compel this procedure, since the trial court should not be held to have committed an error with regard to a question it did not rule on and which was not called to its attention. Furthermore, the court might have been able to rectify the error if it had been called to its attention at the proper time.

(c) The party aggrieved may have deliberately failed to raise the issue for the purpose of insuring an appeal in the event he lost in the trial court.[14] Therefore, he is estopped from later asserting the error on appeal, or he may be deemed to have waived the error by his silence.

(d) The appellant will not be allowed to alter the theory of the case as it was tried below.[15]

(e) Respect for the judicial system is lessened because of the delay that would result in allowing the appellant, once or repeatedly, to appeal errors not raised by him at the proper time, which errors both the court and the appellee did not notice and/or rely on.

(3) The appellate court has the power to review the error, but its exercise is discretionary and it has chosen to exercise its power in certain circumstances only.[16]

(4) The appellate court has the power to review the error, and its exercise is mandatory in every circumstance (though "every circumstance" may relate only to a particular class of cases).[17]

---

[13]Omaha v. State, 24 Wyo. 513, 161 Pac. 558 (1916).

[14]However, it may be doubted that accused would gamble with a "fundamental right." It might also be doubted whether this reasoning is valid where the accused had no opportunity to object. United States v. Douglas, 155 F.2d 894 (7th Cir. 1946).

[15]Smith v. U.S., 173 F.2d 181 (9th Cir. 1949); Tunstall v. Walker, 6 Miss. (2 S. & M.) 638 (1844).

[16]Cappon v. O'Day, 165 Wis. 486, 162 N.W. 655 (1917); State v. Garcia, 19 N.M. 414, 143 Pac. 1012 (1914); Ochoa v. United States, 167 F.2d 341 (9th Cir. 1948).

AN EXCEPTION TO THE GENERAL RULE

In an attempt to balance justice with practical judicial administration, in certain instances review may be had on various issues not properly raised and reserved below.[18]

The power of an appellate court to review errors not raised and reserved below has been held, expressly or impliedly, to emanate from: the appellate court's duty not to ratify void proceedings;[19] the duty of all courts to dispense, administer and promote justice;[20] the duty of the courts to give protection against unlawful deprivation of liberty;[21] or the duty of the appellate courts to supervise the inferior courts.[22]

Some insight into the scope of the exception to the general rule may be gained by noting some of the more frequently recurring labels that courts have placed on the errors it felt justified in reviewing even though the errors were not properly reserved, for example: fundamental error or defect,[23] plain and fundamental error,[24] or plain error in a vital matter.[25]

Certain inherent, inarticulated factors vary the appellate court's exercise of the power to review questions not raised below. The first of these is the nature of a criminal proceeding and the part the judge plays in it. The court (judge) is merely an arbiter who takes a relatively passive part in the dispute. It is presumed that both parties will present their side of the argument in the best manner possible, and it will not be necessary for the judge to take sides; in fact, he is prohibited from taking sides by numerous devices.[26] Any infraction of the "rules of the game" are sup-

---

[17]Uniform Code of Military Justice, Article 67 (b).

[18]Cambell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved*, 7 WIS. L. REV. 91, 160 (1932); 8 WIS. L. REV. 147 (1932); 54 HARV. L. REV. 1204 (1941).

[19]Brown v. State of Miss., 297 U.S. 278 (1935); Voight v. Webb, 47 F.Supp. 743 (E.D. Wash. 1942); State v. Diamond, 27 N.M. 477, 202 Pac. 988 (1921).

[20]Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950); People v. Weiss, 129 App. Div. 671, 114 N.Y.Supp. 236 (1908); Armstrong v. U.S., 65 F.2d 853 (10th Cir. 1933).

[21]Booth v. U.S., 57 F.2d 192 (10th Cir. 1932).

[22]Bishop v. State, 43 Tex. 390 (1875); People v. Murray, 72 Mich. 10, 40 N.W. 29 (1888).

[23]Palmer v. State, 78 Okl. Cr. 220, 146 P.2d 592 (1944) (defined as those errors which go to the foundation of the case, or take from the defendant a right which is essential to his defense).

[24]Pine Grove Nevada Gold Mining Co. v. Freeman, 63 Nev. 357, 171 P.2d 366 (1946).

[25]Wiborg v. U.S., 163 U.S. 632 (1896); Meadows v. U.S., 82 F.2d 881 (D.C. cir. 1936). For "plain error" see MISS. SUP. CT. RULE 6: "2. No error not distinctly assigned shall be argued by counsel except upon request of the court, but the court may at its option, notice a plain error not assigned or distinctly specified." U.S. SUP. CT. RULE 27: "When there is no assignment of errors, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified." FED. R. CIV. P. 52(b): "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention

posed to be brought to his attention, but he is not supposed to seek out infractions. It is the duty of each party to "yell foul." This passivity is true not only of a trial judge, but also applies to an appellate judge, though it may be to a somewhat lesser extent.[27]

Undoubtedly the Anglo-American system of litigation hampers the extension of the exception to the general rule as it tends to create in the

---

of the court." WHITMAN, FEDERAL CRIMINAL PRACTICE UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE 212, 394, 397 (1950); Kaufman v. U.S., 163 F.2d 404 (7th Cir. 1947); United Brotherhood, etc. v. U.S., 330 U.S. 395 (1946); U.S. v. Pena, 175 U.S. 500 (1899); Castledine v. Mundy, 4 B & Ad. 90 (K.B. 1832). Lewis v. U.S., *supra* note 7 (plain and seriously prejudicial errors). Wagner v. U.S., 171 F.2d 354 (5th Cir. 1948) (error prejudicial to defendant). Anderson v. State, *supra* note 10 (material error which injures accused). For errors so substantial as to jeopardize defendants rights see People v. Jung Hing, 212 N.Y. 393, 106 N.E. 105 (1914); Cook v. State, 90 Miss. 137, 43 So. 618 (1907). State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931) (manifest and prejudicial errors). Morris v. U.S., 156 F.2d 525 (9th Cir. 1946) (serious error which is plainly prejudicial). Himmelfarb v. U.S., 175 F.2d 924 (9th Cir. 1949) (seriously prejudicial error). For serious error, resulting in grave injustice to accused or in clearly erroneous judgment see Addis v. U.S., 62 F.2d 329 (10th Cir. 1932). See MISS. SUP. CT. RULE 32: "These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." For error so obvious or of a character so seriously affecting the fairness, integrity, or public reputation of judicial proceedings see U.S. v. Atkinson, 297 U.S. 157 (1936); Johnson v. U.S., 318 U.S. 189 (1943); Benson v. U.S., 112 F.2d 422 (5th Cir. 1940). Williams v. U.S., 66 F.2d 868 (10th Cir. 1933) (serious errors in criminal case involving life or liberty). State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924) (felony case where errors apparent on record deprive accused of a substantial means of enjoying a fair and impartial trial). People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914) (where justice requires it in a capital case). State v. Christensen, 166 Kan. 152, 199 P.2d 475 (1948) (matter of public concern, where record shows statutes determinative in character are involved). Smith v. U.S., 173 F.2d 181 (9th Cir. 1949) (manifest miscarriage of justice or would affect integrity or public reputation of judicial proceedings). Cf. Stein v. U.S., 166 F.2d 851 (9th Cir. 1948). First National Bank v. Russel, 124 Tenn. 618, 139 S.W. 734 (1911) (necessary to meet the ends of justice). State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933); Brasfield v. U.S., 272 U.S. 448 (1926) (error which could not have been effectively remedied or obviated). Similarly, error to which the accused did not have an opportunity to object. United States v. Douglas, 155 F.2d 894 (7th Cir. 1946). Kelly v. State, 204 Miss. 79, 36 So.2d 925 (1948) (no offense charged). Bryant v. State, 65 Miss. 435, 4 So. 343 (1888); U.S. v. Norton, 179 F.2d 527 (2nd Cir. 1950) (no proof that an offense has been committed). State v. Diamond, *supra* note 19 (unconstitutional act). *Contra*: State *ex rel.* Suddoth v. Tann, *supra,* note 9. Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1901); State *ex rel.* Lea v. Brown, 166 Tenn. 669, 64 S.W.2d 841 (1933) (jurisdictional matter). New York C. R. Co. v. Johnson, 279 U.S. 310 (1928); State v. Woodruff, *supra* (public interest). Carter v. State, 198 Miss. 523, 21 So.2d 404 (1945) (fundamental rights of parties or affecting public policy, when to act on such questions would work no injustice to any party to appeal). Brooks v. State, *supra* note 20; State v. Herrera, 28 N.M. 155 207 Pac. 1085 (1922); Apodaca v. U.S., 188 F.2d 932 (10th Cir. 1951) (fundamental rights). State v. Crooker, 123 Me. 310, 122 Atl. 865 (1923) (constitutional right that is a substantive right). Brown v. State of Miss., *supra* note 19 (fundamental principle of justice).

[26]MISS. CODE § 1530 (1942): "The judge in any cause . . . shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. . ."

appellate court a passivity that should not exist in many instances. The system assumes that the two sides will be equally and adequately presented, whereas the truth is that attorneys are not all of the same capabilities, and this inequality of representation is certainly a factor in the results. Many of the more effective attorneys charge fees that place them beyond the reach of the poorer accused. To meet this problem the public defender system is employed in many states. In spite of the defects in the Anglo-American system of litigation it is often said to be the best known substitute for a utopian system of absolute justice; however, these defects should be borne in mind and taken into account in the administration of the system.

A second impediment barring the appellate court's acceptance and extension of the exception to the general rule is found in their legal training and experience. It is very difficult for legally trained persons in many instances to separate substance from procedure[28] or to recognize a substantive right not accompanied by correct procedure.[29] This difficulty has

---

[27]In commenting on the attitude of the medieval judge it was said: "The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question ,'How's that?' This passive habit seems to grow upon them as time goes on and the rules of pleading are developed . . . even in a criminal cause, even when the king is prosecuting the English judge will, if he can, play the umpire rather than the inquisitor. No rule of law prevented him from questioning the prisoner, and probably he did this from time to time; but in general he was inclined to throw as much responsibility as he could upon the jurors or upon the God of battles." POLLOCK AND MAITLAND, II HISTORY OF ENGLISH LAW 670-671 (2nd ed. 1923). *Contra*: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Quercia v. U.S., 289 U.S. 466 (1933).

[28]People v. Weatherford, 160 P.2d 210 (Cal. 1945).

[29]This difficulty prompted Judge Furman to impassionately exclaim: "We are not in sympathy with those who believe in the infallibility of the common-law rules of criminal procedure, or that form, ceremony, and shadow are more important than substance, reason, and justice. This court does not propose to grope its way through the accumulated dust, cobwebs, shadows, and darkness of the evening of the common-law rules of procedure, but it will be guided by the increasing light and inspiration of the rising sun of reason, justice, common sense, and progress. . . . 'as some people think more of a man's clothes and style than his principles, so some lawyers are concerned more with the mere procedure in a trial than with the triumph of the party that ought to succeed on the merits of the case. The quibbling of the logicians and disputants of the middle ages has often formed the subject for satire; but our present-day legal disputes over technical questions or procedure are pettier, less profitable, and more indefensible than the fine-spun arguments and theories of the much-abused schoolmen of the middle ages.'" Turner v. State, 8 Okl. Cr. 11, 126 Pac. 452 (1921). This ability to think of substance apart from procedure Plucknett believes "can only develop when civilization has reached a mature stage." PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 339 (2nd ed. 1936).

led to an emphasis on procedure, probably because it is the more definite and tangible of the two.[30] Courts tend to forget that procedure is merely a means to an end, and that it is substance that is the end desired. Courts are exceedingly hesitant to allow substance to control a decision when it is not accompanied and presented by correct procedure.

Regardless of the importance and necessity of procedure, courts should not allow themselves to reach the point where they are numb to substance apart from proper procedure. Each case should be decided on its own peculiar facts, and the court should make its touchstone of reversal actual "injustice or prejudice" alone—deprivation of a "substantive" right, rather than requiring the co-existence of an artificial dichotomy (i.e., substance and procedure) before it will reverse.

The courts are ruled by another hoary distinction, that of fact and law.[31] In America we are particularly insistent that the jury decide the "facts," since the judge, to many, still represents the king or government and oppression. In many complicated circumstances a distinction between the two is virtually impossible.[32] It has been suggested that appellate courts should be allowed to review the facts as such.[33] There are many obstacles to allowing appellate courts to review facts, such as the sanctity of a jury verdict, appellate organizational difficulties, knowledge of the appellate court limited to the record, etc., etc., but in many instances it would not be cynical to state that it would be the recognition of an existing procedure.

In addition to the three foregoing difficulties that tend to limit or hinder the extension of the exception to the general rule, many appellate courts are somewhat limited in determining their own appellate procedure because of the existence of statutes on the subject.[34] Even a statute that was intended to be liberal may impliedly circumscribe the extent of appellate review. For instance, a statute that authorizes the appellate court to

---

[30]"Where modern public opinion would insist upon a trial which was substantially fair, the mediaeval public looked rather at the procedure and inquired whether all the steps in it were properly carried out. . . . procedure, considered as a safeguard, played a large part in constitutional struggles. Arbitrary action by the Crown or its officials necessarily involved a breach of procedural rules sooner or later. In 1215 the barons at Runnymede appealed to procedure as the only effective protection for their persons and property, and nearly two centuries earlier the same principle had been formulated in an edict of the Emperor Conrad II (1037) for the Holy Roman Empire. It is represented to this day in the due process clauses in the federal and state constitutions of America." PLUCKNETT, *op. cit. supra,* note 29, at 338.

[31]ORFIELD, CRIMINAL APPEALS IN AMERICA 78-91 (1939).

[32]*Id.* at 85.

[33]"The law and the practice should be brought into harmony by express authority to review the facts. 'Justice ought not to be insincere or accidental.'" Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. of PA. L. REV. 825 (1936).

[34]MISS. CODE §§ 1518, 1544, 1987, 2436 ,2449, 2450, 2510 (1942).

review *capital* cases even though errors are not preserved[35] impliedly prohibits the appellate court from reviewing errors not preserved in other cases—even other serious felony cases in which the errors committed may be just as flagrant as the errors committed in capital cases. It is submitted that this exceptional power to review cases contrary to the general procedure in certain instances is an inherent power, and it is not wise or necessary to legislate on the subject.

A factual presentation is the only logical or profitable way to illustrate the kind of error an appellate court will notice when the appropriate steps to raise and reserve the error have not been taken, as it is clear from the diverse phraseology already mentioned that no vague legal maxim is helpful in determining the scope of the exception.

A Classification of Errors

Statute.[36] Where the constitutionality of the act involved determines whether a crime has been committed[37] or raises a matter of public policy[38] this question may be first raised on appeal. If an ordinance, defining the offense for which the accused was convicted, is construed in such a manner by the trial court in its instruction to the jury that it deprives the accused of his right to free speech the appellate court may notice the error *sua sponte.*[39] If the constitutionality of the statute is necessary to the jurisdiction of the subject matter it may be first raised on appeal.[40] Where a statute is involved which has already been declared unconstitutional by the highest court of the state it may be first raised on appeal,[41] but if the statute has already been held constitutional it is likely that this question may not be first urged on appeal.[42]

Indictment.[43] Errors in an indictment, to be first urged on appeal, must go to the substance[44] of the indictment and not to its form.[45] Illustrations of errors of "substance" warranting review and reversal even though not properly preserved are: a material variance between the indictment

---

[35]People v. Jung Hing, 212 N.Y. 293, 106 N.E. 105 (1914).
[36]8 Ind. L. J. 328 (1933); 33 Col. L. Rev. 692 (1933).
[37]State v. Rawls, 161 La. 628, 109 So. 146 (1926); State v. Pugh, 31 Ariz. 317, 252 Pac. 1018 (1927); State v. Diamond, *supra* note 19.
[38]State v. Dillard, 196 Ala. 539, 72 So. 56 (1916).
[39]Terminiello v. City of Chicago, 337 U.S. 1 (1949); 21 Miss. L. J. 278 (1950).
[40]Griggs v. State, 130 Ga. 15, 60 S.E. 103 (1908); Casper v. State, 13 Ga. App. 301, 79 S.E. 94 (1913); State v. Jones, 4 N.J. 374, 72 A.2d 872 (1950).
[41]Warner v. Hallihan, 281 Ill. App. 300 (1936).
[42]People v. Fensky, 290 Ill. 612, 125 N.E. 292 (1919).
[43]21 Rocky Mt. L. Rev. 76 (1948).
[44]Armstrong v. U.S., 65 F.2d 853 (10th Cir. 1933).
[45]Shinn v. State, 93 Ark. 290, 124 S.W. 263 (1910).

and the proof,[46] and failure to charge a crime.[47] It has been held it is a matter of state procedure when objections to the indictment may be raised where no right of the accused under the Federal Constitution is involved.[48]

Grand Jury. Since a state may dispense with indictment or presentment by a grand jury and substitute a proceeding by complaint or information[49] errors with regard to the grand jury are generally disregarded.[50] Many states have statutes that provide that certain defects relative to the grand jury are cured if not objected to before a certain stage of the proceedings.[51] It has been held that a failure to swear the grand jury may not be first raised on appeal,[52] but a venire that was drawn contrary to statute has been first attacked in the appellate court.[53]

Jurisdiction. Generally, jurisdiction over the subject matter[54] may not be waived by a failure to properly preserve the error, but jurisdiction over the accused[55] may be waived. In Missisippi it was originally held that jurisdictional facts need not affirmatively appear in the record of a court of general jurisdiction, as jurisdiction was presumed until the contrary affirmatively appeared, but that jurisdictional facts had to affirmatively appear in the record of a court of special jurisdiction.[56] Following the earlier pronouncement of the court it was later held that lack of jurisdiction must affirmatively appear in the record to warrant review of the defect not properly presented below.[57] The present attitude of the Mississippi court seems to be that jurisdiction must affirmatively appear in the record of a court of general or special jurisdiction, and the omission of jurisdictional facts may be first urged on appeal.

---

[46]Clark v. State, 100 Miss. 751, 57 So. 209 (1912) (Indictment showed accused killed "Tobe Wallace" and evidence showed deceased's name to be "Tobe Hollis" and error was first noticed on appeal even though it was capable of amendment in the trial court).

[47]Kelly v. State, *supra* note 25 (indictment omitted word "did" before "kill and murder"); Reed v. State, 171 Miss. 65, 156 So. 650 (1934) (indictment failed to allege that burning in arson case was "malicious"); McGaha v. State, 173 Miss. 829, 163 So. 442 (1935) (indictment failed to allege ownership of the stolen property); Wash v. State, 206 Miss. 858, 41 So.2d 29 (1949) (indictment omitted to set forth time, place and circumstance of former marriage, or name of person with whom former marriage is alleged to have been contracted in bigamy case). See, People v. Wiechers, *supra* note 3 (dissent).

[48]Flowers v. State, 209 Miss. 86, 41 So.2d 352 (1949), *cert. denied,* 339 U.S. 946 (1950).

[49]Brown v. State of Miss., *supra* note 19.

[50]Brantley v. State, 21 Miss. (13 S. & M.) 468 (1850).

[51]Miss. Code § 1784 (1942); Flowers v. State, 209 Miss. 86, 41 So.2d 352 (1949) (Impaneling of the grand jury is conclusive evidence of their competency and an objection on this ground may not be made after impaneling).

[52]Brown v. State, 173 Miss. 542, 161 So. 465 (1935).

[53]Trammell v. State, 151 Ala. 18, 44 So. 201 (1907).

[54]Graham v. State, 196 Miss. 382, 17 So.2d 210 (1944); State *ex rel.* Lea v. Brown, *supra* note 25.

[55]*Ibid.*

[56]Byrd v. State, 2 Miss. (1 How.) 163 (1834).

[57]Hunt v. State, 61 Miss. 577 (1884).

Numerous errors have been tagged "jurisdictional" by the courts, such as: failure to prove venue,[58] error with regard to change of venue,[59] lack of a jury trial,[60] absence of a properly certified record,[61] defective trial procedure,[62] the omission of a necessary allegation in a warrant of deportation,[63] conviction under a void law,[64] a sentence in excess of that allowed by statute,[65] and failure to give statutory notice to court reporter.[66] The present definition given "jurisdiction" by the federal courts definitely includes "due process,"[67] whereas the older conception of "jurisdiction" was mainly based on power.[68]

Jury.[69] Trial by jury may be abolished[70] or waived where it is guaranteed,[71] but the accused may not be deprived of his right to trial by jury against his will where it is guaranteed, and if he is so deprived the error may be first noticed on appeal.[72]

Judge. Where a trial judge does not perform a duty that is placed on him by statute, the appellee may raise the error even though it was not properly reserved below, on the ground that the duty was "mandatory" and not "permissive."[73] The trial judge in inquiring as to the numerical division of the jury which fails to agree committed error that may be first raised on appeal,[74] and the same importance has been attached to the judge remarking to the jury that they should not depend on anything the accused's

---

[58]Kitchens v. State, 186 Miss. 443, 191 So. 116 (1939); Waldrup v. State, 150 Miss. 302, 116 So. 432 (1928).

[59]Roper v. Commonwealth, 7 N.M. 255, 33 Pac. 1014 (1893). *Contra.* Prussel v. Knowles, 5 Miss. 90 (1839).

[60]State v. Hirsch, 91 Vt. 330, 100 Atl. 877 (1917); Johnson v. Zerbst, 304 U.S. 458 (1938).

[61]Travillion v. State, 206 Miss. 236, 39 So.2d 773 (1949); Galloway v. State, 144 Miss. 696, 110 So. 665 (1926).

[62]People v. Wilson, 15 Cal.App.2d 172, 59 P.2d 187 (1936).

[63]Mahler v. Eby, 264 U.S. 32 (1923).

[64]State v. Diamond, *supra* note 19.

[65]State v. Swikert, 65 Ore. 286, 132 Pac. 709 (1913).

[66]American Creosote Works v. Rose Bros., 51 So.2d 220 (Miss. 1951) (this failure is "jurisdictional" and precludes consideration by appellate court of transcript of evidence).

[67]Voight v. Webb, *supra* note 19; Moore v. Dempsey, 261 U.S. 86 (1923); Johnson v. Zerbst, *supra* note 60.

[68]Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Webster's New Collegiate Dictionary, 458 (1939).

[69]3 Wharton's Criminal Procedure §§ 1668, 1743 (10th ed. 1918).

[70]Brown v. State, *supra,* note 19; Anderson v. State, *supra* note 10.

[71]State v. Cristensen, *supra* note 25; Patton v. U.S., 281 U.S. 276 (1929) (either altogether or the usual number of twelve). *Contra.* Voight v. Webb, *supra* note 19 (Cannot be waived in first degree murder because jury must determine punishment); Hunt v. State, 61 Miss. 577 (1844) (Accused can never consent to a jury composed of less than twelve men).

[72]State v. Christensen, *supra* note 25.

[73]Williams v. State, 179 Miss. 419, 174 So. 581 (1937) (judge failed to sign minutes before expiration of term).

[74]Brasfield v. U.S., 272 U.S. 448 (1926).

counsel might say.[75] However, it has been held that error was not committed that may be first noticed on appeal where the judge said in the presence of the jury that the accused's counsel did not want the truth to come out[76] or where the judge threatened to send the accused to jail for misconduct.[77]

Instructions.[78] A statute providing that a judgment shall not be reversed for error in the instruction unless such error is excepted to has been held constitutional, since it affects no vested right, but merely regulates the remedy;[79] however, it has been held that an instruction which violates the Constitutional right of free speech in its construction of the ordinance under which the accused is being tried may be noticed by the appellate court of its own motion.[80] Various errors and omissions in instructions have been held of sufficient gravity to justify the appellate court in noticing the errors or omissions even though they were not urged below: failure to give an instruction to acquit, even though not requested, when there is no evidence to sustain a verdict;[81] failure to give a requested instruction on a vital phase of the case;[82] failure to instruct on statutes and regulations defining offenses charged;[83] failure to define certain vital terms used;[84] failure to include in the instruction given all the essential elements of the offense;[85] and failure to fully present all material issues raised.[86]

The federal courts take the view that where there is an alleged error with regard to an instruction, even though this allegation was not made below, they will examine the record far enough to see that there has been no miscarriage of justice as a result of the alleged error.[87]

Other errors that have been first noticed on appeal are: the submission to the jury of a count in support of which no evidence had been introduced;[88] an instruction which deprived the accused of his plea of self-defense;[89] an instruction which was highly prejudicial and calculated

---

[75]Bennett v. State, 127 Fla. 759, 173 So. 817 (1937).
[76]Addis v. U.S., *supra* note 25 (in view of clear evidence of guilt).
[77]Morrison v. State, 37 Okl. Cr. 359, 258 Pac. 1050 (1927).
[78]1 U. of Fla. L. Rev. 92 (1948).
[79]Johnson v. State, 42 Tex. Crim. Rep. 87, 58 S.W. 60 (1900).
[80]Terminiello v. City of Chicago, 337 U.S. 1 (1949); 21 Miss. L. J. 278 (1950).
[81]Wiborg v. U.S., *supra* note 25.
[82]United Brotherhood etc. v. U.S., 330 U.S. 395 (1946). Unless evidence clearly shows the element to be present which was omitted in charge. People v. Brott, 163 Mich. 150, 128 N.W. 236 (1910).
[83]Morris v. U.S., 156 F.2d 525 (9th Cir. 1946).
[84]Palmer v. State, *supra* note 23.
[85]Apodaca v. U.S., 188 F.2d 932 (10th Cir. 1951).
[86]Palmer v. State, *supra* note 23.
[87]Giles v. U.S., 144 F.2d 860 (9th Cir. 1944).
[88]Williams v. U.S., 66 F.2d 868 (10th Cir. 1933).
[89]People v. Tomlins, *supra* note 25.

to mislead the jury;[90] an instruction on "reasonable doubt" in a capital case;[91] charging on the facts.[92]

Evidence. Appellate courts usually take the position that it is the function of the jury to pass upon the weight and worth of evidence, and the credibility and veracity of witnesses, and they cannot set aside a verdict of guilty unless it is clear that such verdict is the result of prejudice, bias, or fraud, or is manifestly against the weight of the credible evidence,[93] or unless "manifest injustice" was committed.[94] The federal courts have held that where the sufficiency of the testimony to support the verdict was not raised below, the question is not reviewable by the appellate court, and under such circumstances the appellate court will only look into the record to see that there has been no miscarriage of justice, or that there is some testimony tending to support the verdict.[95]

Where the accused is represented by an inexperienced attorney who has been appointed by the court, some courts hold it is the duty of the trial court to refuse, of its own motion, the introduction of highly prejudicial hearsay evidence, though accused's counsel does not make a timely objection.[96] Where the accused conducts his own defense, failure to properly preserve errors may not preclude the appellate court's consideration of the sufficiency of the evidence to support the verdict.[97] Great care is usually taken in reviewing capital convictions, especially where, in addition to the confession and admissions of the accused, the corroborating evidence is circumstantial.[98] It is also held that in felony cases the appellate court may notice the admission of incompetent evidence apparent from the record.[99]

---

[90]Dowell, Inc. v. Jowers, 166 F.2d 214 (5th Cir. 1948) (a civil case).

[91]Bennett v. State, *supra* note 75.

[92]Bogileno v. U.S., 38 F.2d 584 (10th Cir. 1930) (intent of accused); Strader v. U.S., 72 F.2d 589 (10th Cir. 1934) (motive certain witnesses had in testifying); State v. Green, 48 S.C. 147, 26 S.E. 234 (1897) (instruction drawing inferences from the facts).

[93]Ivey v. State, 206 Miss. 734, 40 So.2d 609 (1949).

[94]In Smith v. U.S., 173 F.2d 181 (9th Cir. 1949) the court states: ". . . we do not test 'manifest injustice' by whether or not *we* are convinced of appellant's guilt. The test is rather whether the now contested evidence, in the light of all the facts of the case before the court, so improperly prejudiced appellants in the eyes of the jury as to deny them a fair trial and thus require us to reverse, even though, *we* might feel that if the contested evidence was deleted, the jury would still have returned a finding of guilty."

[95]Marco v. U.S., 26 F.2d 315 (9th Cir. 1928).

[96]People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933).

[97]Stecher v. State, 202 Wis. 25, 231 N.W. 168 (1930).

[98]Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932).

[99]In State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924) the court stated: "This court is bound, in a capital case (and we think equally so in a case of felony involving the deprivation of the defendant's liberty), to take notice, in behalf of the accused, of any error apparent upon the record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial."

Some of the errors that have been first urged on the appellate court are: where there is a total lack of any evidence to show the commission of a crime or to connect defendant with a crime after commission is shown;[100] exclusion of evidence concerning a defense;[101] evidence introduced that accused had committed other crimes in a capital case where the evidence was close and accused was poorly represented;[102] complete denial of right to cross examine;[103] the admission of a prior consistent statement of a witness who had not been impeached or discredited;[104] denial of accused's right to testify as to his motive or intent when this is material;[105] in capital case where evidence is not clear on a vital issue and accused could not testify intelligently on the subject because he was either drugged or insane;[106] introduction of evidence that accused, a Negro, committed a wholly disconnected crime and was "sassy and impudent" to officers;[107] witnesses not able to testify without fear and intimidation;[108] cross-examination of accused concerning statements made by him during proceedings to procure a confession by force, which confession had already been excluded;[109] the admission of a confession obtained by brutality and violence;[110] in first-degree murder case where "unnecessary, irrelevant, incompetent, and highly prejudicial evidence" was admitted;[111] introduc-

---

[100]Tyler v. State, 74 Okl. Cr. 39, 122 P.2d 826 (1942); Clark v. State, *supra* note 46; Patterson v. State, 188 Miss. 718, 196 So. 757 (1940); In Cogsdell v. State, 183 Miss. 826, 185 So. 206 (1938) it is stated: "This would be the equivalent of taking a judgment by default on the merits which in felony cases is fundamentally erroneous, whatever may be the guise of the attempt so to do." Nichols v. State, 198 Miss. 821, 24 So.2d 14 (1945); Bryant v. State, *supra* note 25; U.S. v. Norton, 179 F.2d 527 (2nd Cir. 1950) (Citing to support this holding FED. R. CIR. P. 52(b), *supra* note 27); Wiborg v. U.S., *supra* note 25. (1896) (where adequate proof is not adduced, the jury should be instructed to acquit them, in the absence of such an instruction the appellate court will first notice the error); State v. Garcia, 19 N.M. 414, 143 Pac. 1012 (1914) (where evidence not only fails to support verdict, but shows accused innocent the appellate court may first notice the error *sua sponte*); Tyler v. State, 74 Okl. Cr. 39, 122 P.2d 826 (1942) (where the evidence is weak but not absolutely absent the judgment will not be reversed); Williams v. U.S., 66 F.2d 868 (10th Cir. 1933) (no evidence supporting one of four counts and judgment reversed as to this count).

[101]Commonwealth v. Parshall, 139 Pa. Super. 161, 11 A.2d 506 (1940).

[102]People v. Gardiner, 303 Ill. 204, 135 N.E. 422 (1922).

[103]State v. Crooker, 125 Me. 310, 122 Atl. 865 (1923); State v. McNinch, 12 S.C. 89 (1879); State v. Bigham, 133 S.C. 491, 131 S.E. 603 (1926) (where witness died before cross-examination, no "waiver" because not a voluntary relinquishment).

[104]People v. Jung Hing, *supra* note 25.

[105]State v. Stenback, 78 Utah 350, 2 P.2d 1050 (1931).

[106]Carter v. State, 198 Miss. 523, 21 So.2d 404 (1945).

[107]Scarbrough v. State, 204 Miss. 487, 37 So.2d 748 (1948) (burglary case and reversed even though accused was "guilty beyond every reasonable doubt").

[108]See Fisher v. State, 145 Miss. 116, 110 So. 361 (1926).

[109]In Fisher v. State, *ibid*, speaking of "watercure" administered to accused to procure a confession the court said: "The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

[110]Brown v. State, *supra* note 19. *See* Lisenba v. People, 314 U.S. 236 (1941).

[111]Suhay v. U.S., 95 F.2d 890 (10th Cir. 1938).

tion of evidence obtained by an unreasonable search and seizure;[112] accused "compelled to give evidence against himself";[113] and failure to prove venue.[114]

Audience. After the accused has plead "not guilty" in a felony case he may not waive his right to a public trial by silence, and failure to give the accused a public trial in this instance may be first urged on appeal.[115] Usually misconduct of the audience may not be raised for the first time in the appellate court, but there may be at least two exceptions[116] to this general rule: (1) Where there is a very pronounced unfriendly demonstration which the judge must have observed, and he does nothing whatever or he does the equivalent of nothing. (2) Where the hostility of the audience makes it dangerous for the party to raise the objection. In a hearing on a petition for a writ of habeas corpus the United States Supreme Court has said: ". . . if the case is that the whole proceeding is a mask . . . neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights."[117]

Punishment. Where the accused is denied "due process of law" the conviction and sentence are void, and the petitioner is entitled to release on a writ of habeas corpus.[118] A necessary part of "due process of law" is the requirement that the punishment inflicted must be authorized by law.[119] Certain errors in the punishment or sentence may be raised for the first time on appeal: sentence patently erroneous;[120] sentence pronounced on Sunday;[121] failure of the jury to determine the punishment;[122] sentence in the alternative;[123] punishment that is cruel or unusual;[124] punishment exceeding that allowed by statute;[125] and punishment for one continuous offense as if there were separate offenses.[126]

Accused. The accused's rights fall into two categories:[127] (1) those in which the state, as well as the accused, is interested (which rights gen-

---

[112]Brooks v. State, *supra* note 20; U.S. v. Asendio, 171 F.2d 122 (3rd Cir. 1948).
[113]Brooks v. State, *supra* note 20.
[114]Kitchens v. State, *supra* note 58.
[115]State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906).
[116]Dean v. State, 162 Miss. 155, 160 So. 584 (1935).
[117]Moore v. Dempsey, 261 U.S. 86 (1923).
[118]Voight v. Webb, *supra* note 19; WHARTON, *op. cit. supra* note 69 § 1939.
[119]Anderson v. State, *supra* note 10.
[120]Lewis v. State, 154 Fla. 825, 19 So.2d 199 (1944).
[121]Ball v. U.S., 140 U.S. 118 (1891).
[122]State v. Christensen, *supra* note 25.
[123]State v. Sturgis, 110 Me. 96, 85 Atl. 474 (1912).
[124]Weems v. U.S., 217 U.S. 349 (1910).
[125]State v. Deleo, 156 La. 672. 101 So. 17 (1924).
[126]*Re* Snow, 120 U.S. 274 (1887) (The error was treated as jurisdictional in habeas corpus proceedings).
[127]State *ex rel.* Lea v. Brown, *supra* note 25; State v. Christensen, *supra* note 25.

erally may not be waived); (2) those which are personal to the accused (which are in the nature of personal privileges and may be waived). Where a statute[128] authorizes an accused to waive his right to be present at the trial, at the discretion of the court, the privilege may be waived in a capital case, as well as in any other felony case;[129] however, if it appears that the accused did not receive a fair and impartial trial a new trial will be granted, although failure to secure a fair and impartial trial was due to accused's waiver of right to be present.[130] Where a statute requires the accused's presence at the trial of an indictment for a felony neither the accused nor his attorney may waive the right in a capital case.[131]

Prosecutor. Improper remarks of the prosecutor which have not been challenged may not be urged on the appellate court unless they amount to a most extreme and intolerable abuse of privilege.[132] Some courts hold, even in capital cases, that all objections to the improper argument of the prosecutor are waived unless objected to at the proper time.[133] Where the guilt of the accused is reasonably certain the court will not consider improper argument of the prosecutor,[134] but the court will notice the error when the guilt of the accused is doubtful.[135] If the error of the prosecutor in making an improper remark is consciously and intentionally not raised and reserved by accused's counsel the point may not be urged on appeal,[136] though this would seem to be contrary to the theory underlying the exception to the general rule. Where the prosecutor's argument is so prejudicial that its effect could not have been removed by instructions, though not objected to at the trial, it may be first challenged on appeal.[137]

Counsel.[138] Some courts hold that the accused may waive the right guaranteed to him by the Bill of Rights to be heard *pro se* or through counsel,[139] but this waiver must be intelligently made.[140] The due process

---

[128]Miss. Code § 2519 (1942).

[129]Thomas v. State, 117 Miss. 532, 78 So. 147 (1918).

[130]*Ibid.*

[131]Hopt v. Utah, 110 U.S. 574 (1884).

[132]Cartwright v. State, 71 Miss. 82, 14 So. 526 (1893); Brush v. Laurendine, 168 Miss. 7, 150 So. 818 (1933) (duty of the trial judge to intervene of his own motion).

[133]State v. Turner, 36 S.C. 542, 15 S.E. 602 (1892) (Prosecutor argued excluded facts and begged jury not to believe the accused because he was a man of no religion, and did not believe in God, heaven, or hell).

[134]People v. Watson, 216 N.Y. 565, 111 N.E. 243 (1916).

[135]Oglesby v. State, 156 Fla. 481, 23 So.2d 558 (1945); People v. Watson, *ibid* (prosecutor reflected on accused's failure to take the stand).

[136]Johnson v. U.S., *supra* note 25 (prosecutor commented on accused's failure to testify, and the accused's counsel excepted, but later withdrew the exception, and did not ask that the jury be charged to disregard the comment).

[137]Smith v. State, 248 Ala. 363, 27 So.2d 495 (1946).

[138]18 Miss. L. J. 468 (1947).

[139]Brown v. State, 219 Ind. 251, 37 N.E.2d 73 (1941).

[140]Johnson v. Zerbst, *supra* note 60; Wagner v. U.S., 171 F.2d 254 (5th Cir. 1948); Voight v. Webb, *supra* note 19; 38 Jour. Crim. Law & Criminology 375 (1947).

clause of the Fourteenth Amendment does not of its own force require appointment of counsel for accused in a criminal case in a state court.[141] Where lack of counsel or lack of competent counsel results in so many prejudicial errors that the accused is denied a fair trial the appellate court will review the case even though the errors were not properly raised and reserved.[142] Where counsel is appointed by the court for the accused his failure to save errors will generally receive more liberal treatment by the appellate courts than those made by counsel of the accused's own choosing,[143] but some courts evidently do not consider this element.[144] In most cases the reasoning of the courts which weigh this factor is that whenever the accused chooses his own counsel, either competent or incompetent, he holds him out to the world as his spokesman in the proceeding, and his acts are impliedly sanctioned and adopted by the accused as his own. But where the court is under a duty to appoint counsel for the accused it is implied that the court will appoint competent counsel, else the right to counsel would be a nullity. It might also be reasoned that the imputation of sanction and adoption by the accused of his counsel's acts is more tenuous when counsel is appointed by the court, the accused exercising little choice in the matter.

Appellate courts have held reversal was not warranted in the following instances where the error was first urged in the appellate court:[145] favorable verdict might have been obtained by a more competent attorney;[146] illness of the defense counsel;[147] intoxication of the defense counsel;[148] tiredness of the defense counsel;[149] or that defense counsel was allegedly non compos mentis.[150]

Conclusion

In criminal cases, as compared with civil cases, courts are more likely to place substance over procedure,[151] and this predilection is further emphasized when the crime is a felony,[152] particularly a capital case.[153] One

---

[141]Bute v. Illinois, 333 U.S. 640 (1947).

[142]Gibbs v. Burke, 337 U.S. 773 (1948); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933); Brooks v. State, *supra* note 20.

[143]State v. Williams, 9 Houst. 508, 18 Atl. 949 (Del. 1890).

[144]Porter v. State, 193 Miss. 774, 10 So.2d 377 (1942).

[145]Wharton, *op. cit. supra* note 69, § 1819.

[146]People v. Thompson, 321 Ill. 594, 152 N.E. 516 (1926).

[147]Vowells v. Commonwealth, 15 Ky. 574 (1894); Darbey v. State, 79 Ga. 63, 3 S.E. 663 (1887).

[148]O'Brien v. Commonwealth, 115 Ky. 608, 74 S.W. 666 (1903); Territory v. Clark, 13 N.M. 59, 79 Pac. 708 (1905).

[149]Hanye v. State, 99 Ga. 212, 25 S.E. 307 (1896); Tiller v. State, 110 Ga. 250, 34 S.E. 204 (1899).

[150]State v. Bethune, 93 S.C. 195, 75 S.E. 281 (1912).

[151]Weems v. U.S., 217 U.S. 349 (1910).

[152]State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924).

[153]People v. Brott, 163 Mich. 150, 128 N.W. 236 (1910); People v. Jung Hing,

reason that might be offered for the difference in treatment of civil and criminal cases is the current world-wide emphasis on "life" as contrasted with "property." Another reason might be the historical importance that has been placed on the safeguards intended for an individual's benefit in litigation between him and the state. A justification offered for the variation of caution exercised by appellate courts as between capital and non-capital cases is the court's feeling that great care should be taken in reviewing capital convictions before the court lends its sanction to the taking of a life, which when taken away cannot be restored.[154]

Generally, the errors for which an appellate court will reverse, when the errors were not raised or reserved below, must be very important. The errors have been given various names, and undoubtedly the quantum of error or injustice necessary varies somewhat depending on the jurisdiction, and, although there is no real degree of predictability present, the error must be of such importance that the appellate court feels justified in discarding procedure in the particular case in order to see "justice" done. Most appellate courts emphasize that the exception is applied at its discretion, and it is not a matter of right. The error must be real and such that it probably influenced the verdict in most cases. It is an *exception* to the general rule that applies only in exceptional circumstances.

The application of the exception is almost always limited to errors that are apparent on the record[155] or "plain" by the contents or the omissions of the record,[156] in other words, a patent error. This requirement is not too helpful, however, although it certainly means the appellate court cannot try the case again. The appellate court must still review the case as it comes to it.

Many courts have not been candid in their opinions concerning the problem, a fact which stems in part from their inability to define the exception. An exception that amounts to "justice" is too broad and undefined to admit, even though this very looseness is its most laudable characteristic. This lack of candor is harmful in that it does not increase predictability, but more than that, some courts, not so sophisticated, may be handicapped by lack of precedent under the doctrine of *stare decisis.*

The exception may be epitomized by saying that: (1) most courts admit they have this exceptional or inherent power (usually basing the power on their primary function of rendering justice), but (2) the exercise

---

supra note 25 (statutory).

[154]Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932).

[155]State v. Woodruff, *supra* note 25; State v. Christensen, *supra* note 25; People v. Brott, *supra* note 153; State v. Bigham, 133 S.C. 491, 131 S.E. 603 (1926).

[156]U.S. v. Capital Meats, 166 F.2d 537 (2nd Cir. 1948); See note 25 *supra.*

of the power is discretionary upon their determination that justice has not been rendered, or as a result of the errors it is not likely that justice has been rendered, and (3) the court's insistence upon usual procedure would foreclose consideration of the error; therefore, (4) the usual procedure of review will be discarded in order that justice may be rendered or given a better chance of being rendered. The exception to the general rule is an attempt on the part of appellate courts to syncretize the seeming antipodes of justice and efficient administration. To augment the force of the exception Professor Orfield suggests ". . . the way out is not simply in review of objections not raised, but in improving the bar so that the objections will be raised and preserved."[157] It might also be suggested that in many cases the accused has a choice of remedies and he is not limited to begging the appellate court to exercise its exceptional and inherent power to review errors not properly preserved (the other remedies may be a writ of error coram vobis, the writ of error coram nobis, and the writ of habeas corpus). Therefore, appellate courts might insist that he use these other established remedies rather than upset established procedure.

It would seem that the general rule, unaccompanied by the exception, discounts human error. This writer believes that an assumption of perfection is erroneous and dangerous; therefore, the exception should prove to be salutary, *provided* it is exercised with a wise judicial discretion in exceptional cases only, and further, *provided* it is not employed by the federal courts to usurp the powers that belong solely to the state courts. The courts should be careful to remember that there are two parties to the suit, and that the application of the exception in most instances will not be "fair" or "just" with regard to the state. An exaggerated regard for the rights of the individual would have serious ramifications, and it might hamstring the entire system.

Joe Ivy Gillespie

---

[157]84 U. of PA. L. REV. 845 (1936).

RECENT DECISIONS

Affinity—Position of Stepchildren

Does the stepchild relationship cease when the natural parent dies and leaves no issue by the surviving stepparent?[1] This question arose when the Tax Collector of the State of Washington contended that certain devisees were not entitled to benefits accorded stepchildren under the inheritance tax laws of that state because the "tie of affinity" was broken by the death of the natural parent, thus constituting the stepchildren legal strangers to the testatrix. Held: The "tie of affinity" was not broken, and the state's contention to the contrary should be restricted to those fields in which this concept developed; i.e., cases involving juror qualifications[2] and incest cases,[3] *In re Bordeaux' Estate*, 225 P.2d 433 (Wash. 1950).[4]

Much litigation has resulted from the "tie of affinity" relationship, and the confusion that often exists stems from determining which view to adopt in ascertaining whether the "tie of affinity" is or is not broken.[5] These problems are not restricted to inheritance or tax questions alone but must also be considered in cases involving such issues as whether there is a valid challenge of a judge or juror because of affinity ties; whether there is cohabitation within degrees prohibited by law in questions of incest; whether beneficiary provisions can be complied with by affinity relationships in workmen's compensation and insurance policies; whether legal heirs include steprelations in wills and descent and distribution; and whether the stepchild can sue for the death of its stepparent under the wrongful death statute.

Since in Mississippi the Inheritance Statute[6] taxes the decedent's estate or the transfer thereof, this problem does not arise in tax cases. However, Mississippi has established and follows the view of the subject case on juror qualifications;[7] and although the decisions concerned with incest do not present the same factual problems,[8] it is reasonable that the courts would follow the rule of the subject cases.[9]

The only Mississippi case which applies the theory as announced in the subject case[10] is in the field of insurance.[11] This lack of authority unfortunately provides no direct precedent for the solution of problems arising in the remaining fields men-

---

[1]There is no question that relationship continues with surviving issue by the stepparent. Paddock v. Wells, 2 Barb. Ch. 331 (N.Y.); *In re* Sheard's Estate, 181 Wash. 62, 42 P.2d 34 (1935).

[2]Gillespie v. State, 168 Ind. 298, 80 N.E. 829 (1907); Bigelow v. Sprague, 140 Mass. 425, 5 N.E. 144 (1886); Goodall v. Thurman, 38 Tenn. 209 (1858).

[3]Henderson v. State, 25 Ala. App. 263, 157 So. 884 (1934); Back v. Back, 148 Iowa 223, 125 N.W. 1009 (1910); Noble v. State, 22 Ohio St. 541 (1872).

[4]*Overruling Re* Raine's Estate, 193 Wash. 394, 75 P.2d 933 (1938).

[5]Steele v. Suwalski, 75 F.2d 885 (7th Cir. 1935); Benefield v. United States, 58 F. Supp. 904 (S.D. Tex. 1945).

[6]Miss. Code §§ 9262 *et seq.* (1942).

[7]Wilbe Lumber Co. v. Calhoun, 163 Miss. 80, 140 So. 680 (1932) ("tie of affinity" is broken).

[8]Spence v. State, 131 Miss. 91, 95 So. 97 (1923); *overuling* Chancellor v. State, 47 Miss. 278 (1872).

[9]See note 4 *supra.*

[10]Simcoke v. Grand Lodge of A. O. U. W., 84 Iowa 38, 51 N.W. 8 (1892); McGoughey v. Grand Lodge of A. O. U. W., 148 Minn. 136, 180 N.W. 1001 (1921); American General Insurance Co. v. Richardson, 132 S.W.2d 161 (Tex. Civ. App. 1939).

[11]Soverign Camp W.O.W. v. Cole, 124 Miss. 299, 86 So. 802 (1921) ("tie of affinity" is continued).

tioned above; however, after considering the wording of the Mississippi statute[12] and the decisions of other courts,[13] it would logically seem that the "tie of affinity" would be preserved in cases involving Workmen's Compensation.

One must remember that the rule in the principal case, although liberal, has its limitations and cannot be arbitrarily applied.[14] For example, in the field of Wills, the problem involved is the interpretation of the words children,[15] issue,[16] heirs,[17] and family;[18] however, it has been conclusively determined that the rule of the subject case does not apply in this field. Also the Mississippi statute[19] clearly indicates that this question does not fall under the law of descent and distribution.

Although it would seem that a dependent stepchild should be permitted to recover for the wrongful death of its stepparent, there is no authority to support such a contention. On the contrary, the statute[20] and the fact that it must be strictly construed[21] indicate that there can be no such action. Other states have so held.[22]

The Court in the principal case has very capably clarified the confusion often existing as to the stepchild relationship in "tie of affinity" cases and has conformed with the modern tendency to assimilate the stepchild to the natural child.[23]

James McClure, Jr.

BANKRUPTCY—DEGREE OF CARE REQUIRED OF REORGANIZATION TRUSTEE

Action against a reorganization trustee attempting to surcharge him personally with profits of employees made with his knowledge. The trustee, in order to get experienced assistance, had hired two employees with the condition that they could personally continue to trade in securities of the debtors' subsidiaries. HELD: A trustee is personally liable when he allows employees to profit at the expense of the corporation. *Mosser v. Darrow,* 71 Sup. Ct. 680 (U.S. 1950).

---

[12]MISS. CODE § 6998-02(12) (1942) ("stepchild" included in definition of child).

[13]Union Trust Co. v. Union Collieries Co., 131 Pa. Super. 405, 200 Atl. 267 (1938); Security Union Casualty Co. v. Kelly, 299 S.W. 286 (Tex. Civ. App. 1927).

[14]Tie of affinity considered broken in a beneficiary case where there was entirely no association between children and alleged stepfather for twenty-five years. Brotherhood of Locomotive Firemen & Engineermen v. Hogan 5F.Supp. 598 (D.Ct. Minn. 1934). There should be some evidence of continuation of affinity relationship. Steele v. Suwalski, *supra* note 5.

[15]Must be the usual meaning unless otherwise indicated. Spence v. Guarantee Loan & Trust Co., 222 Ala. 221, 132 So. 32 (1931); Duncan v. DeYampert, 182 Ala. 528, 62 So. 673 (1913).

[16]Are legitimate lineal descendants unless otherwise indicated. Everett v. Dockery, 203 Miss. 125, 33 So.2d 832 (1948); Trowbridge v. Trowbridge, 127 Conn. 469, 17 A.2d 517 (1941).

[17]Are legitimate lineal descendants unless otherwise indicated. Harlsleroad v. Bass, 84 Miss. 483, 36 So. 537 (1904); Lydick v. Tate, 380 Ill. 616, 44 N.E.2d 583 (1942).

[18]Note 3, 154 A.L.R. 1421.

[19]MISS. CODE §§ 467 *et seq.* (1942) (follows civil law).

[20]MISS. CODE § 1453 (1942).

[21]Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So.2d 791 (1944).

[22]Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936) (stepchild cannot sue although entirely dependent).

[23]Note, 52 HARV. L. REV. 515.

Under the reorganization provisions of Section 77B of the National Bankruptcy Act,[1] Congress intended to hold trustees[2] to a high degree of responsibility,[3] which is both broad and strict.[4] In corporate reorganization proceedings good faith or innocent motives of the fiduciary or his well-intentioned plan of reorganization constitutes no defence to liability founded on breaches of fiduciary obligations.[5] The trustee is an officer of the court,[6] entitled to ask instructions from the court,[7] and can be surcharged for any loss that his wrongful conduct may have occasioned.[8] When a corporation is undergoing reorganization under the National Bankruptcy Act, the obligations of those in control as trustees are enforced even more rigorously than otherwise.[9] However, in the past in the absence of proof of unfaithfulness, fraud, fraudulent intent, or loss, no surcharge could be maintained against a trustee in a corporate reorganization proceeding.[10]

In the subject case no actual fraud was found. This case thus extends the doctrine of liability of a trustee further than previous cases.[11] In instances where the law is changed or, as here, extended, much can be said for not allowing the new rule to have retroactive effect.[12] While the general rule[13] in the past has been to give retroactive effect to changes in law,[14] there are a number of courts which refuse

---

[1]52 Stat. 840 (1938), 11 U.S.C. § 207 (1946).

[2]52 Stat. 888 (1938), 11 U.S.C. § 556 (1946). A trustee must have no conflicting interests: *In re* Los Angeles Products Co., 46 F. Supp. 77 (S.D. Cal. 1941); *In re* Kitterer Mfg. Co., 155 Fed. 987 (D.C.M.D. Pa. 1907); *In re* Lewenshon, 98 Fed. 576 (D.C.S.D.N.Y. 1899); 11 Remington, Bankruptcy § 4486 (5th ed. 1950).

[3]*In re* New York Investors, 130 F.2d 90 (2nd Cir. 1942) (trustee's office not to be delegated); 1 Scott, The Law of Trusts § 402 (1939) (guarantor relationship arising from delegation of discretionary powers).

[4]*In re* Los Angeles Lumber Products Co., *supra* note 2.

[5]*In re* Los Angeles Lumber Products Co., *supra* note 2; *In re* McCrory Stores Corp., 12 F. Supp. 267 (S.D.N.Y. 1935).

[6]Chapel v. First Trust Co., 30 F. Supp. 765 (E.D. Wis. 1940); *cf.* Hartford Accident and Indemnity Co. v. Green, 223 Ala. 96, 134 So. 487 (1931).

[7]52 Stat. 890 (1938), 11 U.S.C. § 567 (1946); *In re* Flamingo Hotel Co., 81 F.2d 749 (7th Cir. 1936); *In re* 211 East Place Bldg. Corp., 14 F. Supp. 96 (D. Ill. 1936); 11 Remington, *op. cit. supra* note 2; C.J.S., Bankruptcy § 851.

[8]52 Stat. 860 (1938), 11 U.S.C. § 75 (1946); *In re* Pittsburg Rys., 117 F.2d 1007 (3rd Cir. 1941); Chapel v. First Trust Co., *supra* note 6; *In re* B.A. Montgomery and Son, 17 F.2d 404 (N.D. Ohio 1927).

[9]Wood v. City Bank Co., 312 U.S. 262 (1941); *In re* Los Angeles Products Co., *supra* note 2.

[10]*Cf. In re* Moorhead Knitting Co., 58 F. Supp. 88 (M.D. Pa. 1944).

[11]The decision might be reconciled with the previous state of the law on the theory of constructive fraud. Constructive fraud is a breach of duty by one acting in a fiduciary capacity, *Cf.* Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Warren v. Robinson, 21 Utah 429, 61 Pac. 28 (1900). Frost v. Latham and Co., 181 Fed. 866 (C.C.S.D. Ala. 1910) (fraud without intent; *Accord:* Windle v. City of Valparaiso, 62 Ind. App. 342, 113 N.E. 429 (1916); *cf.* Combs v. Poulos, 241 Ky. 617, 44 S.W.2d 571 (1931).

[12]Great Northern Ry. v. Sunburst Oil and Refining Co., 187 U.S. 359 (1932); Carpenter, *Court Decisions and the Common Law*, 17 Col. L. Rev. 593 (1917); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Col. L. Rev. 230 (1918).

[13]Succession of Lambert, 210 La. 636, 28 So.2d 1 (1946) (admitting general rule but refusing to follow it); Carpenter, *supra* note 12; Freeman, *supra* note 12; 7 Am. Jur., Courts § 130.

[14]Mickel v. New England Coal and Coke, 132 Conn. 671, 47 A.2d 187 (1946); Carter Oil Co. v. Weil, 209 Ark. 653, 192 S.W.2d 215 (1946).

to recognize this doctrine, insisting that changes have prospective effect only.[15] It is on this ground that Mr. Justice Black, though he agrees with the basis of the decision, dissents in the principal case. It is his contention that "there is no reason why the rule should be retroactively applied to this respondent when to do so is grossly unfair."

While at times it may seem harsh to hold a trustee liable when he acted in good faith with the intention of benefiting the bankrupt, it would seem best not to allow a trustee to substitute his judgment for that of the court. A trustee can obtain the instructions of the court and, according to the policy of the United States Supreme Court as set forth in the subject case, he can expect to be held strictly accountable when he acts independently.

Shirley Norwood.

Charitable Trusts—Cy Pres—Equitable Approximation

Testator's heirs challenged the validity of provisions of testator's will which attempted to create a trust for the furtherance of the education of an indefinite, but ascertainable, class of school children. On the last school days before Christmas and Easter vacations, the trustee was directed to pay the net income from the trust estate to the designated children in equal amounts. Held: The will failed to create a valid charitable trust; therefore, the trust violates the rule against perpetuities and is void, notwithstanding testator's express desire that the payments were "to be used by such child in the furtherance of his or her obtainment of an education." *Shenandoah Valley National Bank of Winchester v. Taylor*, 63 S.E. 2d 786 (Va. 1951).[1]

Charitable trusts,[2] which are distinguishable from other trusts since they do not fall within the rule against perpetuities[3] and since indefiniteness of beneficiaries is an essential,[4] are generally favored by the courts and will be enforced whenever possible,[5] but a purpose recognized at law as charitable is absolutely indispensable

---

[15]Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1891); People v. Maughs, 149 Cal. 253, 86 Pac. 187 (1906); German Gymnastic Ass'n. of Louisville v. City of Louisville, 306 Ky. 810, 209 S.W.2d 75 (1948); Commonwealth v. Whitelaw, 302 Ky. 526, 195 S.W.2d 71 (1946); Button v. Drake, 302 Ky. 517, 195 S.W.2d 66 (1946); Odom v. State, 130 Miss. 643, 94 So. 233 (1922); State *ex rel.* May Dept. Stores v. Haid, 327 Mo. 567, 38 S.W.2d 44 (1931); Hill v. Brown, 144 N.C. 177, 56 S.E. 693 (1907); State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904); Linn County v. Rozell, 177 Ore. 245, 162 P.2d 150 (1945).

[1]Comment, 37 Va. L. Rev. 642 (1951).

[2]Home Ins. Co. v. Cobbs, 20 Ala. App. 491, 103 So. 165 (1925) (charitable trusts are not created by compulsory payments, but usually arise voluntarily). For historical background of charitable trusts see 2 Perry, Trusts and Trustees § 689 *et seq.* (7th ed. 1929).

[3]Mosley v. Smiley, 171 Ala. 393, 55 So. 143 (1911) (a charitable trust contemplates perpetuity); Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367 (1949); Taylor v. Trustees of Jesse Parker Williams Hospital, 190 Ga. 349, 9 S.E.2d 165 (1940); Morgan v. National Trust Bank, 331 Ill. 182, 162 N.E. 888 (1928); Abend v. Endowment Fund Com'rs, 174 Ill. 96, 50 N.E. 1052 (1898); Mills v. Davidson, 54 N.J.Eq. 659, 35 Atl. 1072 (1896).

[4]Gossett v. Swinney, 53 F.2d 772 (8th cir. 1931), *cert. denied*, 286 U.S. 545 (1932); Mosley v. Smiley, *supra* note 3; National Bank of Greece v. Savrika, 167 Miss. 571, 148 So. 649 (1933).

[5]Sparks v. Woolverton, 210 Ala. 669, 99 So. 102 (1924); Succession of Tilton, 133 La. 435, 63 So. 99 (1913); National Bank of Greece v. Savrika, *supra* note 4; Bogert, Trusts and Trustees § 369 (1935).

to a valid charitable trust.[6] "Charitable purposes include (a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes the accomplishment of which is beneficial to the community."[7] The question of whether a given purpose is charitable is a matter of law.[8]

Apparently deliberating as to the wisdom of the gift and the mathematical probability that the funds might not ultimately be used for an educational purpose due to testator's faulty administrative directives,[9] the court declared the dominant intent of testator to be non-charitable. The court was inclined to believe that since the children would receive the monetary benefits immediately preceding a school holiday that the beneficiaries would utilize the money according to the dictates of their childhood impulses and desires rather than for the "furtherance . . . of an education".[10]

But considering the express language of the testator as to the purpose of the trust[11] and the favored position of charitable trusts,[12] one might expect the court to discover a dominant charitable purpose, and remedy the defects of administration frowned upon by the courts by an application of the cy pres doctrine or the equitable approximation doctrine, especially in jurisdictions in which these doctrines have frequently been applied.[13]

The cy pres doctrine had its origin in the Chancery Court in England and migrated into the United States in varying forms.[14] Some courts have defined cy pres as an inherent power of the chancery courts to designate a suitable charitable purpose to which funds may be applied if it is clear that a charity was intended by

---

[6]*In re* Swayze's Estate, 120 Mont. 546, 191 P.2d 322 (1948); RESTATEMENT, TRUSTS § 351; Comment, *Necessity of a Charitable Purpose to Establish a Charitable Trust*, 23 IND. L. J. 505 (1948).

[7]Frost Nat. Bank v. Boyd, 188 S.W.2d 199 (Tex. Civ. App. 1945), *aff'd*, Boyd v. Frost Nat. Bank, 145 Tex. 206, 196 S.W.2d 497 (1946). See also RESTATEMENT, TRUSTS § 368, p. 1140; 4 POMEROY'S EQUITY JURISPRUDENCE § 1021 (5th ed. 1941). (To determine whether a purpose is charitable the courts decide whether the purpose is of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to its accomplishment).

[8]Frost Nat. Bank v. Boyd, *supra* note 7.

[9]Upon the completion of trustee's duty in a proper manner, the children have irretrievable control over the money; and there is no assurance that the money will be used by the children to derive an educational benefit. Compare the similar reasoning and the different basis of decision in Rhodes v. Rhodes, 88 Tenn. 637, 13 S.W. 590 (1890).

[10]Rhodes v. Rhodes, *supra* note 9.

[11]See Comment, *Charities—Words Necessary to Create a Valid Trust for Charitable Purposes*, 44 MICH. L. REV. 846 (1946).

[12]See note 5 *supra*.

[13]Prior to the passage of the cy pres statute in Virginia in 1946, no case had applied the cy pres doctrine in the state of the instant case. VA. CODE ANN. § 55-31 (1950), provides that if there is a charitable purpose, the trust should "be administered to conform as near as may be to the purpose for which created or, if impossible of performance for this purpose, for some other" charitable purpose. For a brief discussion of the unusual judicial history of the charitable trust in Virginia see 25 VA. L. REV. 109 (1925).

[14]But cy pres as administered by the English Chancery Courts comprehended the exercise of the prerogative power of the king; this type of cy pres does not exist in America. Thompson's Ex'r v. Brown, 70 S.W. 674 (Ky. 1902).

the testator, but the object specified cannot be accomplished or is indefinite;[15] however, other jurisdictions hold that cy pres is only the power to alter administrative technicalities,[16] which in effect makes it tantamount to the doctrine of equitable approximation—also an inherent power of the courts of chancery.[17] Still other courts have merged the two doctrines,[18] while Mississippi has emphatically repudiated cy pres[19] and sanctioned equitable approximation.[20]

While the selection as to which of the above described doctrines is to be used by a particular court depends entirely upon the jurisdiction, it appears logical to assume that if Mississippi or other jurisdictions were confronted with the problem presented in the instant case they would declare a charitable purpose to be present, and then correct the inadequacies of the testator's administrative procedures through an application of one of the various forms of either cy pres or equitable approximation.[21]

B. B. McClendon, Jr.

Construction of Deeds—Effect of Warranty Clause Upon Exception of Mineral Interest

Grantor had property conveyed to it in 1922 by quitclaim deed with one-half mineral reservation. In 1926, grantor reconveyed property by warranty deed conveying fee-simple title to property but deed contained an exception clause almost identical to that one used in the original deed to the grantor. Held: The exception clause in the second deed merely described the interest owned by the grantor and its effect was to convey to the grantee exactly what the grantor had received under its original deed and the grantor retained none of the mineral interest in the land by the deed. *Salmen Brick & Lumber Co. v. Williams,* 50 So.2d 130 (Miss. 1951).

The holding of the court in this decision represents a problem in construction of the particular instruments involved. The holding, however, does set at rest some doubt that has existed with regard to the effect of the usual proportionate reduction clause upon the clause of general warranty in a deed of conveyance of real property.

---

[15]Quimby v. Quimby, 175 Ill. App. 367 (1912); Wilber v. Asbury Park Nat. Bank & Trust Co., 142 N.J.Eq. 99, 59 A.2d 570 (1948). See also Fidelity Union Trust Co. v. Laise, 127 N.J.Eq. 287, 12 A.2d 882 (1940) (cy pres applies even when particular purpose of testator fails at outset).

[16]Newton v. Healy, 100 Conn. 5, 122 Atl. 654 (1923); Harwood v. Dick, 286 Ky. 423, 150 S.W.2d 704 (1941) (chancery court has only power to vary particular mode of administration prescribed); Green v. Parker, 92 N.H. 419, 32 A.2d 376 (1943) (cy pres avoids failure of charity only when minor features become impractical).

[17]Newton v. Healy, *supra* note 16.

[18]Newton v. Healy, *supra* note 16; "The doctrine of cy pres as applied in the United States is the doctrine of approximation." 10 Am. Jur., Charities § 123; "The doctrine of cy pres is the doctrine of nearness or approximation, and, as modified and applied by some courts in the United States, has been called the doctrine of approximation." 14 C.J.S., Charities § 52.

[19]National Bank of Greece v. Savrika, *supra* note 4. Mississippi is joined in this minority view of completely rejecting cy pres by Ala., Del., N.C., and D.C., but this rejection is of the English form of cy pres.

[20]Merchants Bank & Trust Co. v. Garrett, 203 Miss. 182 ,33 So.2d 603 (1948); National Bank of Greece v. Savrika, *supra* note 4. *Accord,* Yeates v. Box, 198 Miss. 602, 22 So.2d 411 (1945) (technical rules of construction must yield to actual intent of testator); Low v. First Nat. Bank & Trust Co. of Vicksburg, 162 Miss. 53, 138 So. 586 (1932).

[21]In the instant case court also found that testator did not intend a purpose the accomplishment of which would have been beneficial to the community.

A recent Mississippi case[1] outlines several principles of construction of deeds[2] which are applicable to the present case: (1) the deed must be read in the light of the circumstances surrounding the parties when it was executed;[3] (2) the construction should be upon the entire instrument, and each word and clause therein should be reconciled and given a meaning, if that can reasonably be done;[4] (3) the main document and that to which it refers must be construed together;[5] (4) if the wording of the deed is ambiguous, the practical construction placed thereon by the parties will have much weight in determining the meaning;[6] and (5) in case the deed is ambiguous and subject to two possible constructions, one more favorable to the grantor and the other more favorable to the grantee, the latter construction will be adopted.[7]

When ambiguity necessitates construction, the main issue is "What was the intention of the parties?"[8] The instant case is quite unique in that although the 1926 deed is admittedly not ambiguous on its face the court considers it ambiguous when the appellants seek to show: (1) that as a result of the 1922 deed, the Salmen Co. owned only one-half mineral interest in 1926; and (2) that the "reservation" in the 1926 deed is an additional exception of the remaining one-half of the minerals. The court refused to allow the plain, supposedly unambiguous language of the 1926 deed alone to control what is otherwise the manifested intent of the parties, as ascertained from the express terms of the two deeds. As a consequence, the 1926 deed is not considered in its own light, but is construed along with the 1922 deed, as items in the chain of title.

Several relevant facts from the deeds are considered by the court as evidencing the intention of the parties at the time of the conveyance. The wording of the reservation clause, or more properly the exception clause, in the 1926 deed is identical with the omission of the useless word "necessary" with the wording of the reservation clause in the 1922 deed. Also, it is to be noted that the wording "reserved unto the grant*ors*" used in the 1926 deed reveals an intention to reserve in favor of the original grantors, being in this case the Edward Hines Yellow Pine Trustees, rather than for the grant*or*, a corporation. The 1926 deed included not only a warranty clause, but expressly conveyed "in fee-simple." This denotes that the one-half interest

---

[1]Richardson v. Moore, 198 Miss. 741, 22 So.2d 494 (1945).

[2]Notes, *Deeds, Construction and Operation*, 23 CHI-KENT L. REV. 263 (1945), *Application of Rules of Construction*, 28 ILL. B. J. 241 (1940).

[3]Cook v. Farley, 195 Miss. 638, 15 So.2d 352 (1943); Federal Land Bank v. Cooper, 190 Miss. 490, 200 So. 729 (1941); Williams v. Batson, 186 Miss. 248, 187 So. 236 (1938); Sumter Lumber Co. v. Skipper, 183 Miss. 595, 184 So. 296 (1938).

[4]Dunn v. Stratton, 160 Miss. 1, 133 So. 140 (1931); Southern R.R. v. Anderson, 158 Miss. 543, 130 So. 743 (1930); Shapleigh Hardware Co. v. Spiro, 141 Miss. 38, 106 So. 209 (1925); Harris v. Townsand, 101 Miss. 590, 58 So. 529 (1912).

[5]Dunn v. Stratton, *supra* note 4; Richardson v. Marqueze, 59 Miss. 80 (1881); Newman v. Tymeson, 13 Wis. 191 (1860).

[6]Cummings v. Midstates Oil Co., 193 Miss. 675, 9 So.2d 648 (1942); Yazoo & M.V.R.R. v. Lakeview Traction Co., 100 Miss. 281, 56 So. 393 (1911); Town of Como v. Pointer, 87 Miss. 712, 40 So. 260 (1905).

[7]Sumter Lumber Co. v. Skipper, *supra* note 3; Nettles v. Richman, 228 Ala. 52, 152 So. 450 (1934); Love Petroleum Co. v. Atlantic Oil Producing Co., 169 Miss. 259, 153 So. 389 (1934); Home Mutual Fire Ins. Co. v. Pittman, 111 Miss. 420, 71 So. 739 (1916).

[8]". . . The Cardinal Rule for construction of deeds is to ascertain the intention of the parties as expressed therein. . .," Klein v. Humble Oil & Refining Co., 67 S.W.2d 911 (Tex. Civ. App. 1934), *aff'd*, 126 Tex. 450, 86 S.W.2d 1077 (1935); Cummings v. Midstates Oil Corp., *supra* note 6.

excepted in the 1926 deed was meant as a protection of this warranty clause. If the construction is adopted whereby all the mineral interest in the land conveyed is excepted, then this is itself a breach of that warranty from the execution of the deed.

The factual situation in *Fatheree v. McCormick*[9] fits the facts of the subject case perfectly. There the court weighed heavily the circumstance that the exception was contained in a general warranty deed[10] and subjected the elements of the case to a "test" in deciding whether this was in reality a "reservation" or an "exception."[11] The court held that the exception in the second deed was a description of the grantor's interest, and that he was only describing the extent of this undivided interest.[12]

Two opinions of the Texas Court of Civil Appeals are also analogous. This court in deciding *Klein v. Humble Oil & Refining Co.*[13] considered the two deeds as one, as was done in the subject case, and the intention of the parties was derived from an analysis of both. However, in the *Klein* case the latter deed expressly referred to the former one,[14] a fact on which this case differs from the subject case. In *Peavy-Moore Lumber Co. v. Duhig*[15] this court followed its previous reasoning and applied the general rule[16] that a deed will pass whatever interest the grantor owns unless specific words are used showing an intention to convey a lesser estate.

Thomas Edwin Douglas, Jr.

---

[9]199 Miss. 248, 24 So.2d 724 (1946).

[10]"Where one covenants to warrant generally, he is bound to answer for all defects, and if he desires to avoid any particular defect, he must do so by a limitation in the instrument itself." West Coast Mfg. and Invest. Co. v. West Coast Improvement Co., 25 Wash. 627, 66 Pac. 97 (1901); Green v. Irving, 54 Miss. 450 (1877).

[11]There the court said: "It has been held that a reservation operates by way of a re-grant by the grantee to the grantor of the estate or interest reserved. * * * By this test the grantor could not be said to have reserved one-half of the minerals for he owned only one-eighth. If by a reservation the grantee be viewed as reconveying to the grantor such one-half, the latter would receive back more than he had."

[12]*Accord*: Richardson v. Moore, *supra* note 1; See also, Federal Land Bank v. Cooper, *supra* note 3; Cook v. Farley, *supra* note 3.

[13]Klein v. Humble Oil & Refining Co., *supra* note 8; The court held that since the second deed purported to convey a fee-simple title, excepting only a one-eighth mineral interest, the exception in the second deed was used to protect the warranty given, and in effect simply described the interest conveyed. Comment, 14 TEX. L. REV. 564 (1936); 3 SUMMERS OIL & GAS, § 599 n.17 (2d ed. 1938).

[14]"The property herein conveyed is the same conveyed to us by Robt. Stein and wife by deed dated May 29, 1928, and recorded in Guadalupe County deed record book 97 p. 398."

[15]119 S.W.2d 688 (Tex. Civ. App. 1938), *aff'd*, Duhig v. Peavy-Moore Lbr. Co., 135 Tex. 503, 144 S.W.2d 878 (1940). The court refused to adopt the theory that since the grantee had knowledge of the previous reservation by the first deed, then the reservation clause inserted in the second deed in effect conveyed the land with all the mineral interest excepted. The Supreme Court in their affirmance was consistent with the principles of equitable estoppel, holding that the grantor was estopped to assert title to one-half of the minerals in breach of his warranty. However, the Miss. Supreme Court in the subject case did not find it necessary to pass upon the application of such an estoppel test due to additional facts in the instant case not found in the *Duhig* decision.

[16]The rule so stated is found at p. 690 of the opinion, and is quoted from 14 TEX. JUR. 930 by the court.

Corporations—When Is a Corporation Doing Business in Mississippi

Plaintiff, a resident of Mississippi, sued a Louisiana corporation to recover money wrongfully withheld from him. Under a contract executed in Mississippi, the plaintiff manufactured lumber for the defendant, the defendant sent its trucks into Mississippi each week for two years to receive the lumber, the defendant paid the wages of the sawyer, etc. Defendant tried to avoid the suit by declaring that it was not doing business in Mississippi and therefore was not amenable to service of process. Held: The acts of the defendant constituted a continuous series of acts over a substantial period of time, all of which were in the course of its regular business; therefore, it was doing business in the state within the statute[1] providing for the service of process on non-resident corporations.[2] *Davis-Wood Lumber Co. v. Ladner*, 50 So.2d 615 (Miss. 1951).

The law regulating foreign corporations in Mississippi is statutory.[3] This law is roughly divided into two categories, qualifying[4] and jurisdictional,[5] and the courts have a special construction for each.[6] In the former instance, the courts construe the statutes strictly in favor of the corporations[7] but in the latter, the statutes are construed loosely as a matter of public policy—to allow citizens the right to sue without having to go to the inconvenience of leaving the state to enforce their rights.[8] The constitutionality of these statutes has often been attacked but they have been universally upheld.[9]

When is a foreign corporation doing business in Mississippi? This question is wholly factual and can only be determined by examination of the circumstances of each case.[10] Although the law governing foreign corporations in Mississippi is statutory,[11] the determination of what constitutes doing business is left for judicial decision.[12]

---

[1]Miss. Code § 1437 (1942).

[2]Quaere: Would it make any difference if the defendant in this case was a partnership?

[3]Principal code sections: Miss. Code §§ 1437-1440, 5319, 5345, 5346 (1942).

[4]Davis-Wood Lumber Co. v. Ladner, 50 So.2d 615 (Miss. 1951); Miss. Code §§ 5319, 5343 (1942); 13 Miss. L. J. 548 (1941).

[5]Saxony Mills v. Wagoner, 94 Miss. 233, 47 So. 899 (1908); Gridley, Maxon & Supply Co. v. Turner, 179 Miss. 890, 176 So. 733 (1837); Lee v. Memphis Pub. Co., 195 Miss. 264, 14 So.2d 351 (1943); Davis-Wood Lumber Co., v. Ladner, *supra* note 4; Miss. Code §§ 1437-40, 5345, 5346 (1942).

[6]13 Miss. L. J. 548 (1941).

[7]See note 4 *supra*.

[8]See note 5 *supra*.

[9]Davis-Wood Lumber Co. v. Ladner, *supra* note 4; Kane v. State of N. J., 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927); International Shoe Co. v. State of Washington, 326 U.S. 310 (1945); Traveller's Health Ass'n v. Commonwealth of Virginia, 339 U.S. 643 (1950); Condon v. Snipes, 205 Miss. 306, 38 So.2d 752 (1949); Pennoyer v. Neff, 95 U.S. 714 (1877); Henry L. Doherty & Co. v. Goodman, 294 U.S. 625 (1935); 13 Miss. L. J. 548 (1941).

[10]Davis-Wood Lumber Co. v. Ladner, *supra* note 4; Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 773 (1933); 13 Miss. L. J. 548 (1941).

[11]See note 3 *supra*.

[12]13 Miss. L. J. 548 (1941).

In Mississippi, as in other states, it has been held that the doing of single isolated acts by foreign corporations is insufficient to constitute doing business,[13] but where such act is indicative of and appears to be the first of a series of acts, it will constitute doing business.[14] The best guide which the courts have had so far is that a corporation is doing business so long as it performs acts so authorized by its charter,[15] but there is no guide for determining when that act is performed or how much of it is required.[16]

Another rule is that a corporation is not doing business when it solicits orders through an agent which are to be filled by the foreign corporation at its domicile,[17] but it has been decided differently where the same agent maintains an office in the state of his solicitations.[18]

The corporate law of Mississippi is well defined but the application of the law often produces undesirable results. A good example of this statement is the case of *Lee v. Memphis Publishing Co.*[19] The court held in that case that though the defendant corporation maintained a news collecting office and agent in this state, kept a resident contract man here for the purpose of soliciting new paper distributors, and hired trucks to bring the papers into the state daily, it was not doing business within this state. Such a holding shocks one's sense of justice and fair play and seems to be based on artificial reasoning. The defendant corporation was doing practically everything in Mississippi that it was doing in Tennessee except the actual printing of the paper itself. Since it was enjoying the benefits and protection of the laws of this state, there seems to be no reason why it should not have been made to bear any burden placed upon it by those laws.

It seems that the rule enunciated in the subject case is sufficiently broad to be determinative of the issue raised in the *Memphis Publishing Co.* case. The subject case lays down as nearly an all-inclusive working rule as can practicably be formulated, i.e., where the corporation is doing acts in furtherance of its corporate purposes and these acts are continuous in nature, and done for a reasonable length of time, the corporation is doing business in the state and is amenable to the laws thereof.

Cary E. Bufkin

---

[13]Item Co. v. Shipp, 140 Miss. 699, 106 So. 437 (1926); Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 (1926); Peterman Construction & Supply Co. v. Blumenfield, 156 Miss. 55, 125 So. 548 (1930); Harleston v. West Louisiana Bank, 129 Miss. 202, 91 So. 423 (1922).

[14]Davis-Wood Lumber Co. v. Ladner, *supra* note 4; RESTATEMENT, CONFLICT OF LAWS § 167.

[15]Davis & Worrell v. General Motors Acceptance Corp., 153 Ark. 626, 241 S.W. 44 (1922); Hoffstater v. Jewell, 33 Idaho 439, 196 Pac. 194 (1921); State v. Superior Court of Yakima County, 136 Wash. 653, 241 Pac. 303 (1925); Crites v. Associated Frozen Food Packers, 183 Or. 191, 191 P.2d 650 (1948); Peterman Construction Co. v. Blumenfield, *supra* note 13; Wiley Electric Co. v. Electric Storage Battery Co., *supra* note 13; Marx & Bensdorf v. First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297 (1937).

[16]See note 5 *supra*.

[17]Saxony Mills v. Wagner and Co., *supra* note 5; C. I. T. Corp. v. Stewart, 185 Miss. 140, 187 So. 204 (1939); City Sales Agency, Inc. v. Smith, 126 Miss. 202, 88 So. 625 (1921); Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943). *Contra*: International Shoe Co. v. State of Washington, *supra* note 9.

[18]Marx & Bensdorf v. First Joint Stock Land Bank of New Orleans, *supra* note 14.

[19]Lee v. Memphis Pub. Co., *supra* note 5.

Descent and Distribution—Inheritance From Adoptive Parents—Effect of Second Adoption

Petitioner was adopted by her stepmother in Connecticut, and, prior to the stepmother's death in California, was subsequently adopted by her maternal grandmother in New York. The will of the stepmother left her entire estate to the Roman Catholic Church, and recited that the stepmother had no children. Held: The adoption by the grandmother severed the original relation between petitioner and the stepmother, and the petitioner had no right to inherit any property left by the stepmother. *In re Zaepel's Estate,* 228 P.2d 600 (Cal. App. 1951).

The California Probate Code[1] provides that "an adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relation between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adoptive child."[2] By this statute it would seem clear that the second adoption had severed any relation with the stepmother, but the court did not choose to rely solely on this statute to support its decision. Possibly the fact that this is a case of first impression in California is the reason for the hesitancy in using this statute for the sole support of the opinion.

A statute such as the one involved in the principal case is susceptible of two entirely different interpretations. The majority rule[3] is that, since the statute expressly uses the words "natural parents" and since the relation between the petitioner and the stepmother is adoptive parent and adoptive child, this relation would be entirely outside the scope of the statute. The rule is generally laid down that a second adoption does not cut off the right to inherit from the first adoptive parents.[4] The courts hold that while a new domestic relationship is created, the first adoption is not affected in any particular by the second adoption.[5]

On the other hand, following the minority view,[6] the court in the instant case held that, since the stepmother was made a natural parent by the adoption, the California Statute would apply, and petitioner, by the second adoption, had lost her right to inherit from the stepmother. This view is based on the reasoning that, since the stepmother is no longer entitled to the custody of the child, nor entitled to its services,

---

[1]Calif. P. Code § 257 (Enacted 1931).

[2]Section 1269 of Miss. Code (1942) governs the inheritance rights of an adoptive child in this state. The petitioner must state in the petition what gifts, grants, bequest or benefits he proposes to make or confer upon person sought to be adopted. (The adopted child acquires no right of heirship where the decree of adoption does not vest it with such right.) Lenord v. Weston Lumber Co., 107 Miss. 345, 65 So. 459 (1914); *Accord,* Whitman v. Whitman, 206 Miss. 838, 41 So.2d 22 (1949).

[3]Hawkins v. Hawkins, 236 S.W.2d 733 (Ark. 1951); Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920); Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); Viller v. Watson, 168 Ky. 631, 182 S.W. 869 (1916); *Re* Sutton, 161 Minn. 426, 201 N.W. 925 (1925); Coonradt v. Sailors, 209 S.W.2d 859 (Tenn. 1948); *Re* Egley, 16 Wash. 2d 681, 134 P.2d 943 (1943).

[4]Hawkins v. Hawkins, *supra* note 3; Holmes v. Curl, *supra* note 3; Dreyer v. Schrick, *supra* note 3; Viller v. Watson, *supra* note 3; *Re* Sutton, *supra* note 3; Coonradt v. Sailors, *supra* note 3; *Re* Egley, *supra* note 3; Hale v. Department of Labor and Industries, 20 Wash.2d 14, 145 P.2d 285 (1944).

[5]Holmes v. Curl, *supra* note 3; Dreyer v. Schrick, *supra* note 3.

[6]*Re* Clapp, 197 Mich. 615, 164 N.W. 381 (1917); *Re* Talley, 188 Okla. 338, 109 P.2d 495 (1941).

nor obligated to care for, educate and support petitioner, petitioner should have no right of inheritance when not specifically provided for in the will.[7]

From the above, it may be seen that both the majority and minority views have valid bases for their contentions. For the benefit of the adopted child, it is submitted that the majority is the more favorable and should be followed whenever state statutes permit. If the former parents do not want the child to inherit, it is a simple matter to set that up in the will and by that method this problem will not come into issue.

Ralph D. Pruett, Jr.

Mortgage—Attempt to Have Absolute Deed Declared to Be a Mortgage

In 1948 complainant brought an action to have a deed, absolute in form, which had been acknowledged in 1937, declared to be a mortgage. Complainant's charge was that the land was to be reconveyed when the indebtedness for which the deed was given was paid. Held: Since the grantor relinquished possession to the grantee, and since the only evidence that the deed was to be a mortgage was parol, the action was barred by statute[1] *Nix v. Nix,* 50 So.2d 397 (Miss. 1951).

This statute changed the common law rule in that previously parol evidence was admissible even where possession was surrendered.[2] From a careful reading, however, it will be seen that the statute, by its very terms, is limited in scope. The statute only purports to limit the introduction of parol evidence. Any writing, whether recorded or not, may be introduced.[3] The writing need not be a part of the deed or be referred to by the deed. Letters are sufficient,[4] as is a pawn ticket[5] The statute limits the introduction of parol evidence only where the grantor parts with the possession of the property.[6] In the case of uninhabited land there is a presumption, raised by the absolute deed, that the grantee is in possession. In order to introduce parol evidence to have the deed declared a mortgage, this presumption of occupancy of the uninhabitated land by the grantee must be rebutted.[7] Thus, we have the situation where parol evidence may be introduced to show an absolute deed to be a mortgage in all cases except where the grantor of the deed is not in possession.[8]

The effect of the statute in question has been circumvented by a notable series of cases. In the situation where the consideration for the purchase of land is advanced by one party for the benefit of another, and the lender takes title in his name

---

[7] *In re* Carpenter's Estate, 327 Mich. 195, 41 N.W.2d 349 (1950); *Re* Clapp, *supra* note 6; *Re* Talley, *supra* note 6.

[1] Miss. Code § 272 (1942): "A conveyance or other writing absolute on its face, where the maker parts with the possession of the property conveyed by it, shall not be proved, at the instance of any of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement by the issue to be tried."

[2] Anding v. Davis, 38 Miss. 574 (1860).

[3] Barkwell v. Swan, 69 Miss. 907, 13 So. 809 (1892).

[4] See note 1 *supra.*

[5] Lee v. Wilkinson, 105 Miss. 358, 62 So. 275 (1913).

[6] Culp v. Wooten, 79 Miss. 503, 31 So. 1 (1902); Hierman v. Stricklin, 60 Miss. 234 (1882).

[7] Jordan v. Jordan, 145 Miss. 779, 111 So. 102 (1927).

[8] See note 7 *supra.*

for security purposes, the Supreme Court has held that a trust has been created that may be proved by parol evidence.[9]

The controlling consideration influencing a court to hold an absolute deed to be a mortgage seems to be the intention of the parties. In Mississippi, one criterion for arriving at this intention is the presence or absence of a wide disparity between the value of the land itself and the consideration for the deed.[10] Another criterion has been said to be whether the grantor-debtor is still considered to owe the debt after the conveyance of the land.[11]

In those cases where the court has rejected the contention that the absolute deed was a mortgage, it has generally held that the deed in question was absolute, with something similar to an option to repurchase in the grantor. This holding has resulted when the parties have contracted for a reconveyance, but the grantor was not unconditionally bound to pay the agreed consideration for the reconveyance.[12]

Robert Barber, Jr.

Tenancy in Common—Remedies of Tenants in Common of Personal Property Against Cotenant.

At parties held in their honor, gifts were bestowed upon plaintiff and her fiancee, the defendant in this action. The engagement was subsequently broken, and the defendant kept possession of all the gifts. The plaintiff brought this action in replevin to recover the gifts. Held: Plaintiff and defendant are tenants in common of the common property, and plaintiff does not have the right of exclusive possession necessary to maintain this action. *Mandelbaum v. Weiss,* 77 A. 2d 493 (N. J. 1950).

By legislative enactment in most states,[1] conveyances to two or more persons without qualifying words create tenancies in common.[2]

It is fundamental, both at common law and under the statute,[3] that the party bringing an action in replevin must have the right of immediate possession. Thus it

---

[9]Tanous v. White, 186 Miss. 556, 191 So. 278 (1939); Fultz v. Peterson, 78 Miss. 128, 28 So. 128 (1900).

[10]Freeman v. Wilson, 51 Miss. 329 (1875); Klein v. McNamara, 54 Miss. 90 (1876) where the court said, "The facts which have been indicated by the courts as 'of almost conclusive weight in determining that a conveyance was intended to be a mortgage and not a sale, are: First, was the treaty in reference to borrowing and lending of money, and was the obligation to repay incurred? Second, did the relation of creditor exist before the conveyance and did the relation continue? Third, was there a great disparity in the price of the property?'" See also Lee v. Wilkinson, 105 Miss. 358, 62 So. 275 (1913).

[11]Hoopes v. Bailey, 28 Miss. 328 (1854).

[12]Dixon v. Wright, 175 Miss. 191, 166 So. 374 (1936); Reddy v. Aldrich, 11 So. 828 (Miss. 1892).

[1]For the Mississippi Statutory provision, see Miss. Code § 983 (1942).

[2]See Wolfe v. Wolfe, 207 Miss 480, 42 So.2d 483 (1940), in which the court in commenting on Miss. Code § 983 (1942) said: "The common law favored joint tenancies. Under it a conveyance to two or more persons not husband and wife created a joint tenancy . . . the legislation converting tenancies into tenancies in common merely meets and reverses the presumption at common law that conveyances and devises to two or more persons create joint tenancies." See also Page v. Hoxie, 104 F.2d 918 (1st Cir. 1939); *In re* Horn's Estate, 228 P.2d 99 (Cal. 1951); Muston v. Gardner, 203 Ill. 284, 67 N.E. 779 (1906).

[3]Miss. Code § 463 (1942). This section requires the party bringing the action to make an affidavit that he is entitled to the *immediate possession,* and that the defendant *wrongfully took and detains,* or *wrongfully detains* the same. (Italics added).

is well settled that one cotenant cannot maintain an action in replevin against his cotenant,[4] this for the reason that each has an equal right to the possession of the common property,[5] and in contemplation of law, the possession of one is the possession of all.[6] It has been held, however, that where the entire mass of the property sought by the tenant in common is of the same quality and value and the part to which he is entitled can be readily ascertained by counting or measuring, then replevin will lie.[7]

It is the general rule that trover for conversion will not lie in favor of one cotenant against another who has taken exclusive possession,[8] although in some jurisdictions the action will lie if one cotenant appropriates the entire property to his own use and benefit and deprives the plaintiff of any use and value.[9] Generally, if the cotenant in possession of the chattel sells, destroys, or otherwise makes a disposition of the common property so as to exclude all the rights of his co-owners, trover may be maintained for the conversion.[10]

There remains the question as to the remedies available to a cotenant of indivisible personalty where there has been no sale, destruction, or conversion so as to give the plaintiff a remedy which he might have had in those instances. One remedy, which the Mississippi Supreme Court pointed out in the early case of *Hinds v. Terry,* [11] is for the wronged party to "take them again when he sees his time." This remedy, for obvious reasons, will probably not be very effective or satisfactory. Now, however, the partition of personal property is specifically provided for by statute[12] when the property is capable of equal division. The same statute further provides a remedy for the injured party when the chattel is of an indivisible nature by giving the court authority to order a sale of the property so that the complaining tenant in common may have his share of the proceeds. New Jersery, like Mississippi, furnishes the statutory remedy of partition, or if that be impractical, the sale of the common property and a division of the proceeds.[13] Thus in the instant case, the plaintiff may yet come before the court and have her rights protected.

Curtis E. Coker

---

[4]Garrett v. McAtee, 195 Ark. 1123, 115 S.W.2d 1092 (1938); Estergren v. Sager, 39 Cal. App.2d 401, 103 P.2d 177 (1940); Staple Cotton Co-op. Asso. v. Hemphill, 142 Miss. 298, 107 So.2d 24 (1925).

[5]Krickerberg v. Hoff, 201 Ark. 63, 143 S.W.2d 560 (1940); Bohn v. Bohn, 193 Miss. 122, 5 So.2d 429 (1942); 14 Am. Jur., *Cotenancy* § 77.

[6]James v. Rowan, 14 Miss. (6 S. & M.) 393 (1846); Mann v. Mann, 353 Mo. 619, 183 S.W.2d 551 (1946).

[7]Cathcart v. Malone, 229 S.W.2d 157 (Tenn. 1950); Delay v. Douglas, 164 S.W.2d 154 (Mo.App. 1942).

[8]Moore v. Walker, 124 Ala. 199, 26 So. 984 (1899); Garrett v. McAtee, 195 Ark. 1123, 115 S.W.2d 1092 (1928); Estergren v. Sager, 39 Cal. App.2d 401 (1940); Hinds v. Terry, 1 Walk. 80 (Miss. 1820).

[9]Moskowitz v. Cohen, 286 N.Y.Supp. 152, 158 Misc. 489 (1936).

[10]Wilson v. Ratcliff, 16 Ala. 619, 80 So. 623 (1918); Stitt v. Felton, 136 Pa. Super. 338, 7 A.2d 371 (1939); Tuttle v. Campbell, 74 Mich. 652, 42 N.W. 384 (1889); Hochstettler v. Graver, 48 N.W.2d 15 (N.D. 1951).

[11]Hinds v. Terry, *supra* note 8.

[12]Miss. Code § 983 (1942): Parties to a partion proceedings are restricted to joint tenants, tenants in common or coparceners. White v. Lefoldt, 78 Miss. 173, 28 So. 818 (1900).

[13]N.J. Code Tit. 2 § 171 (1940).

Torts—Duty to Warn Fireman of Hidden Dangers

Action to recover damages sustained by the plaintiff, a fireman, while exerecising his duties in the defendant's warehouse. Defendant knew of the defect which caused the injury but failed to warn the plaintiff of same. Held: Where a fireman enters upon the premises of another in response to the call of duty, the owner or occupant has a duty to warn him of hidden dangers, if owner or occupant has knowledge of the danger and an opportunity to give warning. *Shypulski v. Waldorf Paper Products Co.*, 45 N.W.2d 549 (Minn. 1951).

The owner of realty owes to the public certain duties as regards entry upon those premises. The duty owed is not uniform, but varies with each particular class of entrants, and since the fireman, because of his unique status,[1] does not fit the usual legal categories,[2] other provisions must be made for him. The fireman does not enter by or with the consent of the landlord but under the license of law,[3] and completely oblivious to the will of the landlord.[4] The visit of the fireman is unexpected and unpredictable, and, because of this characteristic, society would be unduly burdened[5] if all property owners were required to maintain a degree of repair, out of proportion to that commensurate with the ordinary use of such property, in mere anticipation of the fireman's possible entry.[6]

The duty owed by the landlord to invitees is that he must either make the premises safe for them or warn them of hidden dangers;[7] the duty by the landlord to trespassers is that he must not willfully or wantonly harm him;[8] and somewhere between these two duties lies that owned the anomalous fireman.

Most courts say that the fireman is a bare licensee[9] and, as such, the duty owed him is comparable to that owed the trespasser.[10] All agree that the work of the fireman is inherently dangerous, and, although he assumes those risks ordinary to his trade,[11] his safety should not be prejudiced by the imposition of hidden perils by

---

[1]Mierers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920); Burroughs Adding Machine Co. v. Fryar, 132 Tenn. 612, 179 S.W. 127 (1915); Prosser, Torts § 78 (1941).

[2]Invitee, Licensee and Trespasser.

[3]Mierers v. Fred Koch Brewery, *supra* note 1; Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892); Smith v. Twin State Gas & Electric Co., 83 N.H. 439, 144 Atl. 57 (1928); Prosser, *op. cit. supra* note 1.

[4]Cudahy Packing Co. v. McBride, 92 F.2d 737 (8th Cir. 1937); Mierers v. Fred Koch Brewery, *supra* note 1; Prosser, *op. cit. supra* note 1.

[5]18 Harv. L. Rev. 397 (1904); Prosser, *op. cit, supra* note 1.

[6]Mulcrone v. Wagner, 212 Minn. 478, 4 N.W.2d 97 (1942); 18 Harv. L. Rev. 397 (1904).

[7]Prudential Ins. Co. v. Zeidler, 233 Ala. 328, 171 So. 634 (1937); Montevallo Mining Co. v. Little, 208 Ala. 131, 93 So. 873 (1922); McCarthy v. Hiers, 81 Ga. App. 365, 59 S.E.2d 22 (1950); Robertson Bros. Dept. Store v. Stanley, 90 N.E.2d 809 (Ind. 1950); New Orleans & N.E.R. Co. v. Brooks, 175 Miss. 147, 165 So. 804 (1936).

[8]Fernandez v. Consolidated Fisheries, 219 P.2d 73 (Cal. 1950); Trudo v. Lazarus, 116 Vt. 221, 73 A.2d 306 (1950).

[9]Cudahy Packing Co. v. McBride, *supra* note 4; Lunt v. Post Printing Co., 48 Colo. 316, 110 Pac. 203 (1910); Gibson v. Leonard, *supra* note 3.

[10]Litch v. White, 160 Cal. 497, 117 Pac. 515 (1911); Lunt v. Post Printing Co., *supra* note 9; Gibson v. Leonard, *supra* note 3; Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899); Elliman v. Gombar, 86 Ohio App. 352, 91 N.E.2d 801 (1950); Burroughs Adding Machine Co. v. Fryars, *supra* note 1.

[11]Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (1937).

the landlord.[12] The harshness of the wilful and wanton conduct rule as applies to bare licensees in general has been recognized by several jurisdictions and some are even modifying it.[13]

In spite of the prestige enjoyed by the general rule,[14] there is respectable and increasing authority for the rule laid down in the subject case.[15] Especially is this true where such knowledge is possessed by the landlord or occupant, and where he has had opportunity to issue warning.[16]

Mississippi follows the general rule as regards bare licensees,[17] and in view of this fact, it would be futile to try to predict the course that the courts of this state would follow if this particular question should arise, but certainly it cannot be doubted that the rule of the subject case is a sound and desirable one. What meritorious reasons can be advanced to justify the view that a property owner, with knowledge of a hidden peril, should be allowed to stand by in silence when a word of warning might save a fireman's life?

Cary E. Bufkin

Torts—Liability of Hospital for Negligent Acts of Nurses

Suit by P, a paying patient in D's private hospital, operated for profit, for damages for the negligence of the hospital's nurses in breaking and leaving a piece of needle in P's arm, with resulting infection. Held: The hospital is liable for the negligence of its nurse. *General Benevolent Ass'n, Inc. v. Fowler*, 50 So. 2d 137 (Miss. 1951).

The business of a private hospital conducted for gain carries with it an implied obligation to give the patients therein reasonable care and attention.[1] The majority rule is that at least where a contract exists binding the hospital to give proper treatment,[2] a nurse on a hospital staff is considered as an employee and the hospital is liable under the doctrine of *respondeat superior* to a patient who suffers injury through the negligence of the nurse while acting within the scope of his or her employment.[3] In other jurisdictions, nurses, when treating a patient, are not considered

---

[12]Smith v. Twin State Gas & Electric Co., *supra* note 3; Campbell v. Pure Oil Co., *supra* note 11.

[13]Ryan v. Chicago & N.W. RR., 315 Ill. App. 65, 42 N.E.2d 128 (1942); Mix v. Minneapolis, 219 Minn. 389, 18 N.W.2d 130 (1945); Bohlen, *Fifty Years of Torts*, 50 Harv. L. Rev. 725, 736 (1936).

[14]Prosser, Torts, *op. cit, supra* note 1.

[15]Smith v. Twin State, *supra* note 3; Jenkins v. 313-321 W. 37th St. Corp., 284 N. Y. 397, 31 N.E.2d 503 (1940); Mierers v. Fred Koch Brewery, *supra* note 1; Mason Tire & Rubber Co. v. Lansinger, 15 Ohio App. 310, 140 N.E. 770 (1923); Beehler v. Daniels, 18 R.I. 563, 29 Atl. 6 (1894); 50 Harv. L. Rev. 739 (1936); Restatement, Torts § 345 (1934).

[16]Smith v. Twin State, *supra* note 3; Jenkins v. 313-321 37th St. Corp., *supra* note 15; Meirers v. Fred Koch Brewery, *supra* note 1; Mason Tire & Rubber Co. v. Lansinger, *supra* note 15, Restatement, Torts, *op. cit. supra* note 15.

[17]Westmoreland v. Mississippi Power & Light Co., 172 F.2d 643 (5th Cir. 1949); Roberts v. Mississippi Power & Light Co., 193 Miss. 627, 10 So.2d 542 (1942).

[1]Maxie v. Laurel General Hospital, 130 Miss. 246, 93 So. 817 (1922); Meridian Sanatorium v. Scruggs, 121 Miss. 330, 83 So. 532 (1919).

[2]Cory v. Beck, 58 Idaho 281, 72 P.2d 856 (1937).

[3]Norwood Hospital v. Brown, 219 Ala. 445, 122 So. 411 (1929); Piedmont Hospital v. Anderson, 65 Ga. App. 491, 16 S.E.2d 90 (1941); Cory v. Beck, *supra* note 2; Skidmore v. Oklahoma Hospital, 137 Okla, 133, 278 Pac. 334 (1929).

as acting for the hospital so as to render it liable for their negligence under the doctrine of *respondeat superior*,[4] at least if the hospital has exercised due care in the selection of its nursing staff.[5] However, in these jurisdictions a hospital is liable for the negligence of its nurses in the performance of mere "administrative" acts.[6]

In holding for or against a hospital under similar facts as those of the principal case, many courts stress the control element. The prevailing view requires substantial elements of control over the doctor,[7] interne,[8] or nurse[9] in order to render the hospital liable. Courts have often utilized the "borrowed servant" doctrine to limit the liability of a hospital for the negligence of nurses and internes acting under the orders of physicians.[10] However, there are cases which hold that where a nurse is following the orders of the patient's own physician, she may still be under the control of the hospital, and it may be liable if she fails to give any treatment reasonably required in addition to or in spite of the orders of the doctor.[11] Some courts, as in the case of physicians, have attempted to differentiate the "administrative" acts of nurses and interns from their "professional" acts, and the results have more often than not been very artifical and difficult to justify.[12]

Rules of liability should be framed to assure competent medical care, and yet the development of hospital facilities must not be discouraged. It is submitted that the better rule in all of these cases would be an inquiry into the agreement between the hospital and patient. If it has undertaken to furnish the professional services of

---

[4]Ware v. Culp, 24 Calif. App.2d 15, 74 P.2d 283 (1937); Andrews v. Roosevelt Hospital, 259 App. Div. 733, 18 N.Y.S.2d 447 (2d Dep't 1940).

[5]Howe v. Medical Arts Center Hospital, 261 App. Div. 1088, 26 N.Y.S.2d 957 (2d Dep't 1941), aff'd, 287 N.Y. 698, 39 N.E.2d 303 (1942).

[6]Steinert v. New Brunswick Home, Inc., 259 App. Div. 1018, 20 N.Y.S.2d 459 (2d Dep't 1940).

[7]Gilstrap v. Osteopathic Sanatorium Co., 224 Mo. App. 798, 24 S.W.2d 249 (1929).

[8]Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153 (1939).

[9]Cory v. Beck, *supra* note 2.

[10]If the hospital's employee can be found to be acting under the control of a physician, the hospital will not be liable for the employee's negligence. *E. g.*, Hull v. Enid General Hospital Foundation, 194 Okla, 446, 152 P.2d 693 (1944).

[11]Valentin v. La Societe Francaise, 76 Cal. App.2d 1,172 P.2d 359 (1946); Wetzel v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 636, 148 N.W. 582 (1914); Broz v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 648, 148 N.W. 575 (1914); Flower Hospital v. Hart, 178 Okla. 447, 62 P.2d 1248 (1936).

[12]*Compare* Sutherland v. Polyclinic Medical School and Hospital, 273 App. Div. 29, 75 N.Y.S. 2d 135 (1st Dep't 1947) (applying hot water bottle a "professional" act; hospital not liable), *with* Iacono v. Polyclinic Medical School and Hospital, 269 App. Div. 955, 58 N.Y.S.2d 244 (2d Dep't 1945) (applying hot water bottle an "administrative" act; hospital liable). *Compare* Ranelli v. Society of New York Hospital, 295 N.Y. 850, 67 N.E.2d 257 (1946) (leaving a patient unguarded on bed an "administrative" act), *with* Andrews v. Roosevelt Hospital, *supra* note 4 (leaving a patient unguarded on table a "professional" act). *Compare* Steinert v. The Brunswick Home, Inc., *supra* note 6 (negligent injection of medicine before operation a "professional" act), *with* Post v. Crown Heights Hospital, Inc., 173 Misc. 250, 17 N.Y.S.2d 409 (Sup. Ct. 1940) (negligent injection of medicine after operation an "administrative" act).

doctors and nurses on its staff,[13] then the mere fact that it cannot control all the details of their acts is not a valid reason to excuse it from liability. In this respect the position of the hospital is not unlike that of other employers of skilled persons.[14] If, on the other hand, it is found that the hospital has undertaken to furnish its facilities only, it should not be liable for the negligence of doctors and nurses.

The above suggested rule seems to have been the underlying basis of the decision in the principal case, and, therefore, it is submitted that the decision is a wholesome and justifiable one.

Albert V. Miller

---

[13]There are many statements, particularly in New York cases, that a hospital undertakes to provide food, facilities, routine attendance and skilled independent contractors, and that medical care is no part of its undertaking toward the patient. *See, e. g.,* In re Renouf, 254 N.Y. 349, 173 N.E. 218, 219 (1930); Steinert v. The Brunswich Home, Inc., *supra* note 6. This view seems rather unrealistic. Certainly most hospitals hold themselves out as offering medical treatment. "The object, aim and purpose of a hospital, the reason for its establishment and operation, is to render and perform medical treatment and nursing of a skilled character. . . . The patient comes to the hospital for advice, aid and treatment . . ." Stuart Circle Hospital v. Curry, *supra* note 8.

[14]*E. g.,* Tetting v. Hotel Pfister, 221 Wis. 141, 206 N.W. 249 (1936) (professional man may be servant even though his employer cannot control his actions other than to hire or discharge); RESTATEMENT, AGENCY § 233 (1933).

RECENT BOOKS

THE INTERNATIONAL COURT OF JUSTICE. By Oliver J. Lissitzyn. New York, Carnegie Endowment for International Peace, 1951, pp. 118.

The Carnegie Endowment for International Peace has now published its sixth volume in a series of United Nations Studies. This volume was prepared by Professor Oliver J. Lissitzyn of the Department of Public Law and Government of Columbia University and contains an interesting Foreword by Hersh Lauterpaght of Trinity College, Cambridge, a recognized authority in the field of international law.[1]

It is this reviewer's guess that the bench and bar of Mississippi, in large measure, have seldom read any book or treatise dealing with international law and the International Court of Justice even though a very interesting general article appeared in the *Mississippi Law Journal* in 1949.[2] The volume here under consideration gives a brief and readable history of the development of international law from a judicial standpoint. It is not a detailed study and unfortunately only discusses the decided cases in a very general manner. At the same time, it is highly recommended and affords the reader a bird's eye view of the Court and some of the problems facing it and the United Nations. It leaves one with a keener appreciation of international problems and the desirability of peaceful resolution of disputes between nations.

For all practical purposes the International Court of Justice is but a continuation of its predecessor—the Permanent Court of International Justice. It is termed the "highest judicial organ" of the United Nations. The Court is composed of fifteen members and there is a prohibition against any two members being of the same nationality; the justices are elected by the political organs of the United Nations; their term of office is nine years, and they may be reelected; five seats are filled at three year intervals and in the elections no state has a veto; ample salaries are paid; and the judges are not concerned with administrative duties. The permanent seat of the Court is at The Hague though it may sit and exercise its functions elsewhere.

The Court is designed to deal with questions of fact as well as of law. To that end, the members of the Court may appoint an individual or an organization with the task of conducting an inquiry or in giving an expert opinion. This procedure was used in one of the most notable cases before the Court—the *Corfu Channel* case.

One very interesting fact gleaned from a reading of this volume is that the Soviet member of the Court does not take "walks" as does his government's representative in the Security Council. In 1950 the Soviet member continued to sit with his Chinese (Nationalist) colleague even though on all other fronts Russia was seeking and demanding membership for the Chinese communists. This should add to the prestige of the Court. As a matter of fact, a large majority of the decisions are the result of unanimous opinion.

Perhaps one of the most difficult problems is that of jurisdiction. Efforts to secure obligatory jurisdiction of the Member States failed at the San Francisco Conference in 1945. The principle of jurisdiction is based on *consent* of the parties and

---

[1]Author of *The Development of International Law by the Permanent Court of International Justice.* London, Longmans, Green and Co., 1934 and *The Function of Law in the International Community.* Oxford, The Clarendon Press, 1933.

[2]McDougal, Myres S., *The Role of Law in World Politics,* 20 MISS. L. J. 253 (1949).

consent may be with full or partial reservations. Only thirty-five states have accepted the compulsory jurisdiction of the new Court. It is suggested that this is the crucial problem in the judicial settlement of international disputes.

> The role of international law and the Court is succinctly stated by the author: "A state which attaches greater value to the attainment of certain objectives than to the preservation of peaceful relations will not be restrained by international law alone from resorting to force. . . . It (international law) makes peace possible but does not guarantee it."[3]

Another weakness is posed by the problem of enforcement of the Court's decisions. The statute merely provides that the Security Council "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[4] Then too, experience of the past forty years clearly indicates that disputes which were most dangerous to the peace of the world never reached the Court, e.g., the armed conflict today in Korea. The author suggests that the real significance of the Court's work lies in its long-range effect; that we have started in the right direction; and the progress, of necessity, will be slow.

*David C. Welch**

CORPORATE MEETINGS, MINUTES AND RESOLUTIONS. By L. Doris and E. J. Friedman. New York, Prentice-Hall, Inc., 1950, pp. 1100, $12.50.

This book is strongly recommended as a manual for the preparation of minutes and resolutions. The authors have successfully directed their efforts toward the presentation of a multitude of various minutes and resolutions which illustrate the usual statutory requirements with skillfully drawn examples. Compiled herein is a vast array of carefully edited entries.

Not only are stockholders meetings, as such, dealt with, but the many allied principles such as quorums, the conduct of these meetings, eligibility of voters, proxies and voting trusts—to name a few—are examined in intimate detail. In addition, a great many of the forms relative to the stockholders' meetings are set out in The Table of Forms.

Directors' and committee meetings also come under the analytical scrutiny of the authors. For example, the validity of their acts, compensation, calling the meetings, place of the meetings, ratification and recission of the acts of these respective groups, along with many other corporate incidents which require entries are dealt with in a very satisfactory manner.

A book of this brevity could not possibly deal too closely with every phase of corporate activity. However, even the popular "employee benefit plans" come in for some discussion and the cases cited in this respect appear commendably pertinent. The legal adviser who confidently recognizes these plans as an implied power of the board of directors may be surprised to learn that even a minority of the stockholders may sue to have an unreasonable or unfair plan set aside.

Of course even a brief volume with so ambitious an objective as this one must eventually concern itself also with the capital structure and the accompanying pro-

---

*Member of the firm of Welch, Cooper and Welch; Laurel, Mississippi.
[3]Page 6.
[4]United Nations Charter, Article 94(2).

cedural maneuvers necessitated. Subscriptions, the issuance and sale of purchase warrants and options, calls for payment of stock and assessments, and transfers of stock are presented in proper order throughout a major portion of this publication.

While the chief concern of a corporation may be to exist on a plane of continued growth, this must not be done to the detriment of the stockholders or owners. That is to say, dividends being the most common incentive for the stockholders' participation, the financial questions involved in dividend declarations are of importance to every corporate policy maker. Consequently, a large amount of material is dedicated to a discussion of such aspects as the kinds of dividends, the mediums of payment, the right of preferred stockholders to participate, and liability of directors—absent as well as dissenting—for illegal dividends.

Although the suggested methods of amending the charter and by-laws seem to appear somewhat premature in the volume, the discussion throughout is both sincere and illuminating. The necessity for strict compliance with statutory requirements for increasing the capital stock is vividly set forth. So, too, is the manner of avoiding non-essential amendments, as well as the possible routes and procedures for reducing capital stock.

No book of this type would be satisfactory without some presentation of the borrowing and lending aspects of corporations. Naturally the Federal Securities Act, the Trust Indenture Act of 1939, and the "blue-sky laws" as they influence the right to issue and sell securities and other evidences of indebtedness are set out in a concise manner.

In short, those who have need of a source book for answering questions arising out of corporate meetings, minutes and resolutions will find not only the basic information in this book of immense aid but will also find the material in the Table of Forms of tremendous value and assistance in the preparation of the sundry and tedious corporate methods.

*Frederick P. Hamel**

FOUR SCORE FORGOTTEN MEN. By Tom W. Campbell. Little Rock, Arkansas, Pioneer Publishing Company, 1950, pp. 416.

Tom W. Campbell has given us a very interesting and informative book, one which seems long past due, and which should receive a warm reception from the lawyers of the nation.

Strange as it may seem, with the exception of only seven, the eighty-seven men who have been honored with service on the bench of the United States Supreme Court, the highest honor that can be obtained by a lawyer within his profession, have become forgotten men. This is true notwithstanding the great power and prestige of that high court and the fact that prior to their appointment all were active and prominent in the public life of their home states and the nation. Campbell has done an excellent job in attempting to restore those men to the realm of remembrance from which most of them have vanished. He has briefly sketched the lives of each judge, touching mainly upon his early life and family background, his achievements as a lawyer and statesman, the circumstances surrounding his appointment, and his record on the bench.

---

*Attorney at Law, Iuka, Mississippi.

This reviewer particularly enjoyed reading the fourteen pages allotted to our own L. Q. C. Lamar.

Four Score Forgotten Men is a great tribute to, and a reminder of, those who have given up a prominent and colorful life to accept the responsibility and obscurity of a place on the highest court in the land.

*Forrest A. Johnson**

PROCEDURE BEFORE THE BUREAU OF INTERNAL REVENUE. By E. J. Goodrich and L. Redman. Committee on Continuing Legal Education of the American Law Institute, 1951, pp. 157. $2.00.

This book constitutes a concise guide for the general practitioner on the handling of tax cases before the Bureau of Internal Revenue, the second of three books on this subject by the publisher. It deals with the procedure from the time a tax return is first questioned until it is settled or set down for litigation. In addition to this particular procedure aspect, there are chapters on the organization of the Bureau, admission to practice, criminal prosecution, and miscellaneous procedures.

*George E. Gleason**

SO YOU WANT TO BE A LAWYER *and* CAREER PLANNING IN THE LAW. By Kenneth Redden. Indianapolis, Bobbs-Merill, 1951, pp. 125 and 195. $2.50 and $3.00.

The first of these two books written by a law professor and placement director, is an excellent book to recommend to young people contemplating the study of law. The author points out the duties and the rewards of a lawyer, and the qualifications and requirements for entering the legal profession. Special emphasis is given to the problem of overcrowding.

The second book is an over-all look at the opportunities in the various fields of legal work. Included are chapters on private practice, location, government work and allied fields of law. Of special interest are the charts on such topics as the distribution, number, and income of lawyers. This book would prove useful to the law student, recent graduate, or, to some extent, any attorney contemplating a change.

*George E. Gleason**

BOOKS RECEIVED

MASTER RESEARCH GUIDE. By Olga Becker. Indianapolis, Indiana, Bobbs-Merill, 1951, pp. 531.

---

*Attorney at Law, Natchez, Mississippi.

*Book Review Editor, Mississippi Law Journal.

Creative

PRINTERS + BINDERS + TYPOGRAPHERS

BIRMINGHAM PRINTING COMPANY

Post Office Box 2531

Birmingham 2, Alabama

CHANGE OF ADDRESS

Each member of the Mississippi Bar in good standing is entitled to receive the Mississippi Law Journal. If you are not receiving your Journal, notify the Secretary, Mississippi State Bar, New Capitol, Jackson, Mississippi.

For Sale or Exchange:

MISSISSIPPI LAW JOURNAL

BACK ISSUES

THERE ARE NOW 23 ISSUES OF THE JOURNAL THAT ARE OUT OF PRINT, AND ONLY A FEW COPIES OF MANY MORE NUMBERS ARE LEFT!

Check your set now and write for a complete price list so that you can fill in the gaps in your set as nearly as possible.

The JOURNAL office will also exchange back issues for numbers which are scarce. Examine your set and send us a list of your duplicates, along with a list of the issues you need.

Don't delay! Make your set as complete as possible before it is too late. Write

MISSISSIPPI LAW JOURNAL — University, Miss.

Announcing for January publication—

MISSISSIPPI CRIMINAL LAW and PROCEDURE

By: Earle L. Wingo

(of the Hattiesburg Bar)

PRACTICAL MANUAL—

The book contains 41 chapters, covering all important crimes, including new subjects in Mississippi, such as Arrests, Searches and Seizures, Extradition, Continuances, Culpable Negligence, etc.
The work is fully annotated to decisions of Mississippi Supreme Court and is keyed to Mississippi Code Annotated 1942 and Supplements.

TIME SAVER—

Much time is saved in research, not only in preparing your case for trial, but as a quick ready-reference manual during the trial.

FORMS—

There is a complete set of forms for criminal procedure, indictments, jury instructions for defense and prosecutions, etc. All forms expressly approved by the Supreme Court.

UP-KEEP SERVICE—

A pocket is provided in the back of the book for supplements, which will be issued as the need arises.

THE AUTHOR—

Mr. Wingo is past president of the State Bar Association and has served for nine years on State Board of Bar Admissions. He is thoroughly experienced in the trial of criminal cases, having tried, in twenty-nine years at the Bar, one hundred and eighty-five capital cases.

1 Volume, beautifully bound in Blue Fabrikoid, prepublication price, $16.00; after publication price, $18.00, delivered.

Send your order NOW, so as to get advantage of the prepublication price.

THE HARRISON COMPANY

Law Book Publishers

93 Hunter Street, S. W. **Atlanta, Georgia**

Keyed

to the

New Federal Rules

and the nationally popular

USCA

It's the recently announeed

WEST'S FEDERAL FORMS

Covering the Practice before the —

Supreme Court of the United States
Court of Appeals
District Courts
Courts of Claims
Tax Court
Court of Customs and Patent Appeals
Customs Court
Banpruptcy Practice Forms
Admiralty Practice Forms

WEST PUBLISHING CO. ST. PAUL 2, MINN.